Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

KINGO KAWAOKA and TATSUMI KAWAOKA,

Petitioners,

vs.

THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A. K. DOUGALL; and DORIS OLSEN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is an action by landowners against local government for the deprivation through regulations, both temporarily and permanently, of the economically beneficial and productive use of their real property. The questions presented for review are as follows:

1. Did the respondents subject real property of the petitioners to a "taking" under the Fifth and Fourteenth Amendments, as that concept has been defined in *Dolan v. City of Tigard*, No. 93-518, June 24, 1994; *Lucas v. South Carolina Coastal Council*, 505 U.S. ___(1992); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), and *Penn Central Transportation Co. v. New York City*, 483 U.S. 104 (1978)?

2. In holding that respondents did not subject petitioners to the deprivation of property without substantive due process of law, did the courts below err by:

a. Failing to consider the impact and harm to petitioners of the subject regulation; and

b. Refusing to consider evidence of invidious discriminatory bias and other bad faith motivations for purposes of rebutting the presumption of the regulations' constitutionality;

c. Failing to extend subject matter jurisdiction on ripeness grounds to petitioners' "as applied" substantive due process challenge to respondents' "general plan" and lack of procedures by which exceptions to the plan could be created?

QUESTIONS PRESENTED FOR REVIEW – Continued

The United States Court of Appeals for the Ninth Circuit below, in answering these federal questions, has rendered a decision in conflict with the decisions of other United States Court of Appeals and the highest court of states, and which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

PARTIES

Petitioner TATSUMI KAWAOKA and Kingo Kawaoka were plaintiffs below. Kingo Kawaoka died while this action was pending. Decedent's wife, petitioner TATSUMI KAWAOKA remains a real party in interest in this action concerning her real property.

Respondent CITY OF ARROYO GRANDE is a California municipality wherein the subject real property is located.

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REPORT OF DECISIONS BELOW

The decisions below were reported as *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994) and *Kawaoka v. City of Arroyo Grande*, 796 F.Supp. 1320 (C.D.CA 1992).

JURISDICTION OF THIS COURT

A petition for rehearing by the United States Court of Appeals for the Ninth Circuit in this matter was denied on April 18, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, ETC. INVOLVED IN THIS CASE

" . . . nor shall private property be taken for public use, without just compensation", Constitution, Fifth Amendment.

" . . . nor shall any State deprive any person life, liberty, or property, without due process of law . . . ", Constitution, Fourteenth Amendment.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983.

"Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city . . . " California *Government Code* sec. 65300.

"After the legislative body has adopted a general plan, the planning agency may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan." California *Government Code* sec. 65450.

"(a) A specific plan shall be prepared, adopted, and amended in the same manner as a general plan, except that a specific plan may be adopted by resolution or by ordinance and may be amended as often as deemed necessary by the legislative body.

"(b) A specific plan may be repealed in the same manner as it is required to be amended." California *Government Code* sec. 65453(a) and (b).

"No specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." California *Government Code* sec. 65454.

"It is the fundamental goal of the City of Arroyo Grande to achieve a community which . . . promotes a rural, small town atmosphere and retains Arroyo Grande's traditional ties to agriculture . . . recognizes limitations upon the natural resources necessary to support urban and rural development and lives within those

limits . . . [and] accommodates a balance of variety of urban and rural lifestyles . . . " general plan of the City of Arroyo Grande, adopted by the City Council of the City of Arroyo Grande on May 22, 1990.

"At such time as they are no longer economically viable, permit the conversion of the existing strawberry fields located south of Grand Avenue near the western city limits to urban use subject to preparation of a specific plan as set forth in Government Code Sections 65450-65457 . . .

a. If converted, utilize the northerly portion of the property adjacent to Grand Avenue for commercially-related uses.

b. If converted, utilize the southerly portion of the property for single family residential (less than 5.- dwelling units per gross acre) and rural residential (less than 2.0 dwelling units per gross acre) uses." Land Use Element ("LUE") 1.5, included in the general plan adopted by the City Council of the City of Arroyo Grande on May 20, 1990.

STATEMENT OF THE CASE

Facts

Kingo Kawaoka was born in the City of Guadalupe, California on July 1, 1906, about 15 miles from present day Arroyo Grande (into the mid 1950s there was no "city" of Arroyo Grande to speak of). As a young man, Mr. Kawaoka worked in agriculture in that region; from the mid 1920s he leased land from Gordon Dixson, later

to become the major of Arroyo Grande, and raised "truck crops".

Petitioner TATSUMI KAWAOKA was born in Penryn, California near Sacramento, California. She and Kingo Kawaoka were married in 1939.

Mr. and Mrs. Kawaoka continued to farm the Dixson property – the backbreaking planting, cultivating, and harvesting of celery, cauliflower, tomatoes, and broccoli by hand through rain and shine – until they lost their leasehold and livelihood when they were interned, like other United States citizens of Japanese national ancestry, in a "relocation camp" (at Gila, Arizona) during World War Two.

After the war, Mr. and Mrs. Kawaoka, with no real assets other than their ability to work hard, were able to return to the Dixson property and continued to work in agriculture. In 1955 the Kawaokas were able to save enough money to buy the land which is the subject of the present action.

For a time, the Kawaokas enjoyed prosperity from the land, which was used for farming strawberries. Mr. Kawaoka was able to contribute to the civic life of his community, the city of Arroyo Grande and the county of San Luis Obispo. He co-founded the Pismo Oceano Vegetable Exchange, a co-op for the Japanese American farmers in the area. He helped to found the San Luis Obispo Buddhist Church, and was an active participant in Arroyo Grande's popular annual Harvest Festival.

Just as the Kawaokas enjoyed prosperity, the City of Arroyo Grande enjoyed growth, until the Kawaokas'

property and a few adjoining smaller parcels of land were all that was left of "agriculture" in the city. "Adjacent to and in close proximity to the Kawaokas' property are twenty additional acres of agricultural land owned by three separate parties, part of which has also been used for strawberry farming. The land surrounding these fifty-five acres is currently used for residential and commercial purposes", *Kawaoka v. City of Arroyo Grande*, 17 F.3d at 1229; indeed, immediately adjacent to the Kawaokas' property are such high density uses as large condominium complexes. By the late 1980s, with Mr. and Mrs. Kawaoka in their elder years and Mr. Kawaoka's health failing, "strawberry farming has become economically non-viable, in part because of the incompatibility of pesticide use with residential use in this primarily residential area", 17 F.3d at 1229. No active strawberry farming has been possible since 1988, Declaration of Craig Kawaoka, set forth in appendix filed herewith.

"In 1988, the City began to update its general plan, a comprehensive land-use plan for the physical development of the City required by state law. Cal.Gov't Code sections 65300-65361 . . . " 17 F.3d at 1229. During hearings conducted in April and May 1990 on the proposed general plan update, the Kawaoka family, through a representative requested that their property be designated for residential use because of the economic non-viability of agriculture on their land, 17 F.3d at 1230.

On May 22, 1990, the City adopted the general plan update, which included among its purposes a vague and cryptic need to maintain "traditional ties to agriculture", as opposed apparently to a need to maintain agriculture itself. The update included the above-quoted Land Use

Element 1.5 which allowed for conversion of the Kawaokas' and others' former strawberry fields into residential and commercial uses upon approval by the City Council of a "specific plan" under California Government Code sec. 65450 et seq. Although never formally adopted by the City Council or published as a municipal ordinance or rule, the courts below concluded, based upon the affidavits of various city officials, that LUE 1.5 was overridden by an agreement apparently having the force of law in which the Kawaokas' property was divided into a northern parcel designated for single family ("SF") use (4.5 units per acre), and a southern parcel designated for rural residential ("RR") use, with 1.0 maximum units per acre, with actual development still conditional upon adoption by the City Council of a "specific plan".

With regards to specific plans, "At the time that the general plan amendment was adopted [i.e., May 20, 1990], the City didn't have any regulations describing how a property owner could apply for a specific plan" 17 F.3d at 1231, and no provision of the California Government Code specifies how a landowner may initiate a process by which the planning agency prepares a specific plan for adoption by the City Council. A "specific plan" is a legislative act, subject to adoption and repeal like other legislative acts (repeal by referendum, for example). The Kawaokas *"were informed that they could not apply for a specific plan until the ordinances containing the guidelines and applicable procedures were in place"*, 17 F.3d 1231 (emphasis added) for adoption of landowner-initiated "specific plans". Not until nearly a year later on May 14, 1991 did the city adopt ordinances purportedly creating a

procedure by which the landowner could initiate the "specific plan" adoption process.

Additionally, at the same time the general plan update was adopted on May 22, 1990, the City Council imposed a water moratorium, i.e., a ban against water hookups on hitherto undeveloped property such as the Kawaokas'. The moratorium was initially declared to last for 45 days, then extended to be in place for an entire year, expiring on May 21, 1991. The moratorium was premised upon a finding that as of May 1990, the city's water supply was 3,492 acre feet, but that if all vacant lots in the city were developed, irrespective of the merits of those individual applications and the specific uses for which water would be used, an annual supply of 4,415-4,611 acre feet would be required. No individualized determination of the Kawaokas' specific water requirements was considered, nor any findings made upon how existing developed properties in the city could contribute towards meaningful water conservation. The courts below acknowledged, however, that there was evidence that if the Kawaokas' property "is converted to residential use at 5.0 units/acre, it would still require less water than they currently use for strawberry farming." There was also an admission by the city engineer to a representative of the Kawaoka family that no such water moratorium was needed and that the moratorium was a mere pretext to block development, 17 F.3d at 1237 note 10 Declaration of Burtram Johnson, included in appendix filed herewith.

Thus, regardless of whether LUE 1.5 was adopted designating petitioner's property for agricultural use or whether some sort of verbal "gentleman's agreement"

designating the property for residential use, and regardless of whether state law allows "specific plans" to be adopted by legislative bodies upon the "initiation" of the landowner, *at least for the period beginning May 20, 1990 (adoption of general plan and water moratorium) and ending either May 17, 1991 (city adopts ordinance allowing for "specific plan" process to be initiated by landowner) or May 21, 1991 (end of water moratorium), the respondent deprived the Kawaokas of all economically beneficial uses of their property,* strawberry farming and other agricultural activities having already become impossible, and no development allowable during the period. Indeed, if, as the Kawaokas contended below, state law allows *only* the municipal government to initiate the "specific plan" adoption process, then the deprivation becomes indefinite (i.e., permanent for all practical purposes) ending only upon the City Council's discretionary exercise of its statutory and necessarily politically-sensitive power to enact "specific plans".

Just as the Kawaokas were deprived of all economically beneficial use of their property, the actual value of the land suffered enormous deterioration as a result of the city's actions. There was evidence that the Kawaokas received an offer to purchase their property for six million dollars ($6,000,000.00) prior to adoption of the general plan and water moratorium (conditioned upon minimum density of 5.0 units/acre) 17 F.3d at 1231, but that an assessment in February 1991 of 36 acres of the property was valued at $2,400,000 (disputed by the Kawaokas as too optimistic, given that in February 1991, the land could neither be farmed nor developed, see *United States v. Certain Parcels of Land,* 261 F.2d 287, 290

(4th Cir. 1958) holding that mere opinion of tax assessor as reflected in his assessment is not admissible as evidence of fair market value). 17 F.3d at 1235.

The courts below observed that there was evidence that the respondent decisionmakers were motivated by factors other than the public health, safety and welfare; specifically, that there was evidence of race prejudice against persons of Japanese ancestry. City council member Doris Olsen responded to the above-described diminished appraisal of the Kawaokas' property by stating "Why should these Japanese people make all that money?" and "Why should these people make so much money?"; in Olsen's eyes, Mr. and Mrs. Kawaoka, United States citizens since the days they were born in California at the start of this century were just "those" Japanese folks out to make money, "These deplorable remarks are insensitive and disturbing and are evidence of prejudice." 17 F.3d at 1239. The above-described deprivation of all economically beneficial use of the property applied to the other three adjoining landowners, two of whom are Japanese, the Toma family and the Matsumoto family, Declaration of Craig Kawaoka, paragraph 7, included in appendix filed herewith. Thus, city dwellers of Arroyo Grande have heretofore maintained their dubious "traditional ties to agriculture" mostly by depriving Japanese American families of the economically beneficial use of their land: *the city has maintained the "traditional ties to agriculture" by requiring land to remain empty, even empty of agriculture!*

Proceedings Below

This action was filed in the United States District Court for the Central District of California after respondents' adoption of the May 22, 1990 general plan and water moratorium, but prior to the May 1991 enactment of an ordinance setting forth procedures purportedly allowing landowners to apply for "specific plans". Petitioners alleged in their operative pleadings that respondents had deprived them of property in violation of their constitutional right to substantive due process. The District Court, ruling prior to this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___ (1992), granted respondents' motion for summary judgment, *Kawaoka v. City of Arroyo Grande*, 796 F. Supp. 1320 (C.D.CA 1992). The United States Court of Appeals for the Ninth Circuit affirmed, *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994), *petition for rehearing and suggestion for rehearing en banc denied* on April 18, 1994. The Ninth Circuit panel also considered several "takings" cases, but concluded that moratoriums upon development for a finite period could never constitute a "taking", 17 F.3d at 1233, and that "this is not a takings case, in which we must balance the public interest supporting the government action against the severity of the private deprivation . . . " 17 F.3d at 1238 citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

ARGUMENT

I. The Ninth Circuit's Conclusion That No "Taking" Under the Fifth and Fourteenth Amendments Occurred is in Conflict with the Rulings of Other Federal Courts of Appeal and the Highest Courts of States.

A land use regulation which "denies all economically beneficial or productive use of land" constitutes a "taking" requiring "Just compensation" under the Fifth and Fourteenth Amendments to the Constitution, *Lucas v. South Carolina Coastal Council,* infra, 112 S.Ct. at 2893 (1992). "Takings" of temporary duration "are not different in kind from permanent takings, for which the Constitution clearly requires compensation", *First English Evangelical Lutheran Church of Glendale v. Los Angeles,* 482 U.S. 304, 318 (1987).

The evidence below indisputably presented a period of time, commencing on May 22, 1990, in which the Kawaokas were deprived of all economically productive and beneficial use of their land. They could not farm and could not build. The court below declined to consider this deprivation and held categorically that "this is not a takings case". The court below purported to be able to discern from the "type" of regulation imposed whether there had been an exercise of eminent domain ("taking") or the police power ("substantive due process"), a methodology which has been likened to "the lawyer's equivalent of the physicist's hunt for the quark", C.Haar, *Land Use Planning (3d Ed. 1976)* 766, quoted in Tribe, *American Constitutional Law (2d Ed. 1988)* 596. All other federal

Courts of Appeals to have considered the question in recent times have held that the initial query is whether the landowner has suffered the deprivation of the economically productive use of the property, not the type of regulation, *Parkridge Investors Ltd. Partnership by Mortimer v. Farmers Home Admin.*, 13 F.3d 1192 (8th Cir. 1994); *Tabb Lakes Ltd. v. U.S.*, 10 F.3d 796 (Fed.Cir. 1993); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990).

The court below recognized that one of its prior decisions had indicated that a water moratorium could indeed constitute a "taking", but only if there was evidence that the findings supporting the regulation were "contrived" or "pretextual" for some purpose other than to protect the public health, safety and welfare, *Kawaoka*, 17 F.3d at 1237-8, interpreting *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990). However, the highest courts of states have held that the decisionmakers' state of mind is irrelevant to Fifth Amendment "takings" analysis; the relevant inquiry is whether there has been a deprivation of the productive use of land, "If an owner is denied productive use of his or her property, that may be a taking regardless of the mental state of the involved government official, whether it be malicious, negligent, non-negligent but mistaken, or non-negligent and not mistaken," *Cannone v. Noey*, 867 P.2d 797 (Alaska 1994).

Because the decisionmaker's state of mind in adopting a regulation is largely irrelevant to "takings" analysis, it is possible for a land use regulation to satisfy the

minimal requirements of "substantive due process", but still subject the landowner to an unconstitutional "taking" of property, *Pennel v. City of San Jose*, 485 U.S 1, 15 (Justice SCALIA, with whom Justice O'CONNOR joins, concurring in part and dissenting in part). For this reason, and because the primary right asserted in this action is the Kawaokas' property rights as property" is used in the Fifth and Fourteenth Amendments to the Constitution, the decision of plaintiffs' counsel below not to specifically allege a "taking" (the complaint having also been filed prior to this Court's decision in *Lucas, infra*) in his complaint does not presently preclude this Court from determining whether a "taking" occurred, and did not stop the court below from considering the question, if in somewhat cursory fashion.

A "taking" can occur even when the landowner enjoys some economic benefit from the property, *Dolan v. City of Tigard*, ___ U.S. ___, ___, No. 93-518 slip op. at page 6, note 9, In light of *Dolan*, the Court of Appeals below erred in not shifting upon respondent the burden of proving, through some sort of *individualized* determination, that its regulations depriving the Kawaokas of the economically beneficial and productive use of their land is related both in nature and extent to the impact of the Kawaokas' hoped for development, i.e., "rough proportionality". An abstract projection of water needs if *all* vacant undeveloped parcels of land in the City of Arroyo Grande were hypothetically developed, without an analysis of the Kawaokas' actual need for water (the evidence that development at 5.0 units/acre would actually require less water than used in the undeveloped agricultural

state), utterly fails to comply with this Court's requirement of "rough proportionality", *Dolan, infra,* at page 16. See *Florida Rock Industries, Inc. v. United States,* 18 F.3d 1560 (Fed.Cir. 1994) holding that even a "partial regulatory taking" requires just compensation under the Fifth Amendment.

Only a hearing granted by this Court can correct the erroneous tests applied below in determining whether a "taking" occurred. The approach taken by the Ninth Circuit is in conflict with other federal Courts of Appeal, the highest courts of various states, and the rulings of this Court.

II. The Determination Below That Petitioners Were Not Deprived of Property Without Substantive Due Process of Law is in Conflict with Other Federal Courts of Appeal and the Highest Courts of States.

1. *Economic Impact of Regulation Upon Landowner*

Although the record below disclosed the total deprivation of the economically productive use of the land, at least for the year following May 22, 1990, and the deterioration by several millions of dollars in the appraised value of the land, the Court below held that the economic impact upon the Kawaokas is irrelevant to a determination of whether they had been deprived of property without the substantive due process of law. The refusal to consider economic impact upon the landowner is inconsistent with the decisions of the highest courts of states and the federal courts of appeals.

For example, in *Guimont v. Clarke*, 121 Wash.2d 625, the Supreme Court of Washington held that "substantive due process" analysis required analysis of "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) *whether it is unduly oppressive on the landowner*", *Id.* at 608-9 (emphasis added). The Supreme Court of Washington found the source of its "unduly burdensome" test for violations of substantive due process in authority from this Court, *Id.* at 609, note 10.

Similarly, "Missouri courts consider whether application of the zoning is substantially related to the alleged purpose of zoning, *as well as the private detriment caused by the application* . . . a reviewing court may find the zoning to be unconstitutionally unreasonable if its *detriment to private interests* outweighs the public benefit", *State ex rel. Barber & Sons v. Jackson Cty.*, 869 S.W.2d 113 (Mo.App.W.D. 1993) at 117 (emphasis added), following *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 839 (Mo. 1963).

2. *Evidence that government officials' state of mind was other than to advance the public health, safety and welfare.*

The court below held that evidence of invidious discriminatory bias against persons of Japanese national origin was not separately actionable as a violation of the Equal Protection of the Laws, but failed to consider whether such evidence could establish the pretextuality of the respondent decisionmakers' state of mind, i.e., that

respondents' motivation was other than to advance the public health, safety and welfare. Similarly, the court below dismissed as irrelevant evidence from various respondent officials that the water moratorium was pretextual for the simply anti-development biases of the City Council. Thus, the court below is in conflict with other federal courts of appeal which have held that evidence of the decisionmakers' state of mind can be used to rebut the presumption that local government actions are constitutional and a good faith and reasonable exercise of the police power, *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986), holding that substantive due process could be violated where regulation was motivated by malice, bad faith, or other invalid or illegal reasons, *Id.* at 604, and cases cited therein.

3. *"As applied" challenge and "ripeness"*

The courts below rejected petitioners' narrower "as applied" challenge on substantive due process grounds because of a perceived absence of a "ripe" justiciable controversy.

The "as applied" challenge presents an actual case or controversy for the same reason that petitioners' "facial" challenge to the various regulations presents an actual case or controversy. There is no question that for years prior to respondents' adoption of procedures by which landowners could supposedly apply for "specific plans" enactment by the City Council, the Kawaokas had notified respondents of the current non-viability of agricultural uses on their property, and their desire to

develop the property for non-maximum density residences. In the absence of any formal procedure for applying for "specific plans" and in view of respondents advising the Kawaokas that no such application would be considered in advance of adoption of the ordinances, the Kawaokas made every other "meaningful application" for permission to develop their property available to them, such as in person contact between the Kawaokas and their representatives on the one hand, and various city representatives on the other. The existence of this "meaningful application", and the respondents' refusal to act upon the application in advance of adopting ordinances regarding "specific plans" creates a case or controversy sufficiently "ripe" for adjudication, *Yee v. City of Escondido*, ___ U.S. ___ (1992), 112 S.Ct. 1522, 1532.

The failure of the court below to consider the economic impact of the respondents' regulations upon the Kawaokas, and the refusal to allow evidence of discriminatory and bad faith motives to be admissible on the issue of whether the respondents' decisionmakers acted in good faith to advance the public health, safety and welfare, is in conflict with the decisions of other federal courts of appeal and the highest courts of various states. Only a decision by this Court can resolve this conflict and give petitioner the "day in court" to which she is entitled under the Constitution.

CONCLUSION

Even though Mr. and Mrs. Kawaoka were deprived of their fundamental civil liberties as United States citizens when they were interned in relocation camps during World War Two, they did not abandon their American Dream. They returned to their pre-wartime home and worked hard to acquire those "bundle of rights" which the courts call "property", an indispensable part of the American Dream. Through their acquisition and productive use of property, the Kawaokas were able to make great contributions to the civic life of their community. They would have readily agreed with Walter Lippman that:

> "The only dependable foundation of personal liberty is the personal economic security of private property . . . There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it . . . is the very essence of the freeman's way of life" *The Method of Freedom* (1934) 100-102.

Kingo Kawaoka died with this action pending, his American Dream shattered by respondents' regulations which have ruined his property rights. Petitioner TATSUMI KAWAOKA does not believe that the dream can be destroyed, under our Constitution, unless the government proves through an individualized determination that its interference with her property rights are justified.

The petition for certiorari should be granted.

Respectfully submitted,

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Tatsumi Kawaoka

Case No. ___

In The

Supreme Court of the United States

October Term, 1994

KINGO KAWAOKA and TATSUMI KAWAOKA,

Petitioners,

vs.

THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A. K. DOUGALL; and DORIS OLSEN,

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Kingo KAWAOKA; Tatsumi Kawaoka, Plaintiffs-Appellants,

v.

The CITY OF ARROYO GRANDE; The City Council of Arroyo Grande; Mark M. Millis; B'Ann Smith; Gene Moots; A.K. Dougall; Doris Olsen, Defendants-Appellees.

No. 92-55714.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 8, 1993.

Decided March 2, 1994.

Property owners brought suit challenging aspects of city's revised general plan and its temporary water moratorium as violative of substantive due process and equal protection. The United States District Court for the Central District of California, David V. Kenyon, 796 F.Supp. 1320, J., granted summary judgment for city, and property owners appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) "as applied" substantive due process challenge was not ripe inasmuch as owners had never submitted formal development plans or filed specific plan application; (2) revised plan's specific plan requirement was rational planning device; (3) rural residential designation of portion of owners' property was rational and did not amount to impermissible spot zoning; (4) rational basis existed for temporary water moratorium; (5) evidence did not establish that city's actions were motivated by racial bias against persons of Japanese

ancestry; and (6) evidence did not establish that owners were irrationally singled out for differential treatment.

Affirmed.

John B. Murdock, Santa Monica, California, for the plaintiffs-appellants.

Katherine E. Stone, Myers, Widders & Gibson, Ventura, California, for the defendants-appellees.

Craig Labadie, Robert N. Katz, McDonough, Holland & Allen, Oakland, California, for the amicus.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, PREGERSON and HALL, Circuit Judges.

FLETCHER, Circuit Judge:

Kingo and Tatsumi Kawaoka appeal the district court's grant of summary judgment for the City of Arroyo Grande (the "City") on the Kawaokas' claims that the City's general plan and temporary water moratorium deny the Kawaokas substantive due process and equal protection. We affirm.

BACKGROUND

Since 1954, the Kawaokas have owned thirty-five acres of land within the City of Arroyo Grande. Until recently, the Kawaokas have used their property primarily for strawberry farming. Adjacent to and in close proximity to the Kawaokas' property are twenty additional

acres of agricultural land owned by three separate parties, part of which has also been used for strawberry farming. The land surrounding these fifty-five acres is currently used for residential and commercial purposes. Recently, strawberry farming on the Kawaokas' property has become economically non-viable, in part because of the incompatibility of pesticide use with residential uses in the primarily residential area.

In 1988, the City began to update its general plan, a comprehensive land-use plan for the physical development of the City required by state law. Cal.Gov't Code §§ 65300-65361 (West Supp.1993). After numerous workshops, the City prepared a draft revised general plan. A primary goal of the general plan was to preserve the traditional rural atmosphere of the area. In the draft revised general plan, with respect to the fifty-five acres belonging to the Kawaokas and the other three landowners in question, the City Council noted that while it wanted to preserve the land for agricultural use, it was concerned that such use might not be economically viable in the future. The City therefore designated the fifty-five acres for agricultural use, but also added Land Use Element Policy ("LUE") 1.5, which states that upon a showing that an agricultural use is no longer viable, the land could be converted to commercial and residential uses.

LUE 1.5 also requires that a specific plan be prepared prior to the land's conversion to residential use.[1] A specific plan is a tool that implements a general plan in one of

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[1] Land Use Element 1.5 states:

> At such time as they are no longer economically viable, permit the conversion of the existing strawberry fields located south of Grand Avenue near the

three ways: (1) by acting as a policy statement that refines the general plan's policies with respect to a specific area; (2) by directly regulating land use; or (3) by combining detailed policies and regulations into a focused scheme for development. *See* Governor's Office of Planning & Research, *Specific Plans in the Golden State*, at 7 (1989). Specific plans must include information regarding the distribution, location, and uses of land within the plan area; the distribution of transportation, sewage, water, drainage, solid waste disposal and energy facilities; standards for developing the land; and a program for implementing development of the land. Cal.Gov't Code § 65451 (West Supp. 1994). The specific plan must be consistent with the general plan. Cal.Gov't Code § 65454 (West Supp.1994).

In April and May, 1990, the City Council held hearings to review the draft revised general plan. The Kawaokas retained a consultant, Burtram Johnson, to appear at several meetings on their behalf. Johnson

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western city limits to urban use subject to preparation of a specific plan as set forth in Government Code Sections 65450-65457 . . .

a. If converted, utilize the northerly portion of the property adjacent to Grand Avenue for commercially-related uses.

b. If converted, utilize the southerly portion of the property for single family residential (less than 5.0 dwelling units per gross acre) and rural residential (less than 2.0 dwelling units per gross acre) uses.

(CR 22, Exh. 2).

argued that the Kawaokas' property should be designated for residential use rather than agricultural use and objected to the specific plan requirement.

In response to the Kawaokas' requests, the City Council changed the land use designation of the fifty-five acres. The Kawaokas' property was divided into two parcels: the northern parcel was designated single family ("SF") use, subject to 4.5 maximum units per acre; the southern portion was designated rural residential ("RR") use, with 1.0 maximum units per acre. According to Lloyd Zola, a planning consultant hired by the City to update several elements of its general plan, these densities were recommended in part because the City believed it faced long term water availability problems. Overall density reductions throughout the City were recommended as one way to address the anticipated water shortage. Zola also recommended this combination of densities as a compromise between the density of surrounding lands and the density that the Planning Commission had proposed to apply to existing non-prime agricultural lands. The specific plan requirement was maintained.[2]

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[2] The Kawaokas argue that the City did not amend the agricultural designation at this time but instead maintained the requirement that the Kawaokas prove that agricultural use is not economically feasible before the land will be designated for residential use. It is true that the language of the general plan LUE 1.5 was not altered. However, the declarations of City Attorney Judy Skousen, Planning Consultant Lloyd Zola, and City Planning Director Doreen Liberto-Blanck all indicate that the City did accept the Kawaokas' request for a residential designation and that the City has informed the Kawaokas of their decision on multiple occasions. The minutes for the April

On May 22, 1990, the City Council unanimously adopted the general plan update. On the same day, it adopted a forty-five day water moratorium imposing restrictions on some development applications in the City. In enacting the moratorium, the City Council relied on reports indicating that the City's water supply was 3,492 acre feet per year as of May 1990. If the City granted all pending development applications, an annual supply of approximately 4,415-4,611 acre feet would be required. If conservation measures were implemented, the City would still have a shortfall of 637 to 833 acre feet per year. On June 26, 1990, the water moratorium was extended by ten months and fifteen days to run for a total of one year.

In 1988 or 1989, prior to the amendment to the general plan, the Kawaokas decided to sell their property. They received two offers for $6 million each, which were rescinded due either to water availability or density problems. At the time the general plan was adopted, the sale documents for the Kawaokas' property were in escrow to a third party, Lee Webb, who had also offered $6 million to purchase the property. Apparently, this offer was contingent on the property being designated for a minimum density of 5.0 residential units per acre. After the adoption of the general plan, Webb terminated the pending escrow and offered to purchase the property for $3,735,000 due to the lower density designations adopted by the plan. This second offer was retracted when Webb

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25, 1990 City Council meeting and the map that accompanies the general plan confirm that the City Council designated the land for residential use.

learned that a specific plan would be required prior to development. The second Webb offer may not have been mentioned to anyone in the Kawaokas family because they instructed their broker to reject any offer of less than $6 million.

At the time that the general plan amendment was adopted, the City did not have any regulations describing how a property owner could apply for a specific plan. The California Code does not require cities to adopt such regulations, but instead appears to envision that the local planning agency will prepare specific plans. *See* Cal.Gov't Code §§ 65450-65457 (West Supp.1994). Section 65456(b) of the California Government Code anticipates that individuals may request that a city adopt a specific plan and authorizes the city to require them to pay a deposit for the estimated cost of preparing the plan. Moreover, state law describes the information that a specific plan must contain and the proper procedures by which the city should adopt the plan. Cal.Gov't Code §§ 65450-65457 (West Supp.1994).

In July 1990, the Kawaokas were advised that the City would adopt ordinances specifying how parties could apply for specific plans. They were informed that they could not apply for a specific plan until the ordinances containing the guidelines and applicable procedures were in place. On May 14, 1991, nine months after the Kawaokas filed this suit, the City adopted the ordinances containing the relevant regulations for applying for and adopting specific plans.

The Kawaokas filed suit in district court in August 1990. In December 1991, the City filed a motion for summary judgment and on April 30, 1992 the district court granted the City's motion. *See Kawaoka v. City of Arroyo Grande*, 796 F.Supp. 1320 (C.D.Cal. 1992). The Kawaokas timely appealed.

The district court had jurisdiction over the Kawaokas' facial challenges under 28 U.S.C. §§ 1332(a) & 1343(a)(3) and 42 U.S.C. § 1983. We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. *"As Applied" Substantive Due Process Challenge*

The district court held that it did not have subject matter jurisdiction over the Kawaokas' "as applied" challenge to the City's water moratorium and general plan because these challenges were not ripe for review. The Kawaokas' "as applied" claim alleges that because the City had no specific procedures or fee schedules for applying for specific plans when the general plan was adopted, the specific plan requirement as applied to the Kawaokas' property is an arbitrary means by which the City is blocking development of the Kawaokas' land.[3] The

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[3] The essence of the Kawaokas' substantive due process claim is that the density designation, the specific plan requirement, and the water moratorium were arbitrary and irrational and in violation of the Constitution. Because the general plan imposes specific requirements on the Kawaokas' property and because it is in fact these requirements (i.e. the density designation and the specific plan requirement) that the Kawaokas

existence of subject matter jurisdiction is a question of law reviewed de novo. *Reebok Int'l, Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 554 (9th Cir.1992).

Ripeness requirements are relevant only to "as applied" challenges, and not to facial challenges. *Southern Pac. Transp. Co. v. Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991). The ripeness doctrine serves the purpose of avoiding premature adjudication of administrative actions. A constitutional challenge to land use regulations is ripe when a property owner or developer has received the planning commission's " 'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' " *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191, 105 S.Ct. 3108, 3118, 87 L.Ed.2d 126 (1985)). We have held that *MacDonald* and *Williamson* require a final decision by the government agency that inflicts a concrete harm on the landowner. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988). Typically, before a decision is final the landowner must have submitted one formal development plan and sought a variance from any regulations barring development in the proposed plan

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challenge, it is difficult to distinguish between the Kawaokas' facial and "as applied" challenges in this case. For this reason, to the greatest extent possible we have characterized the Kawaokas' claims as facial challenges so that they may be analyzed on the merits.

that have been denied. *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir.1988), *cert. denied*, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989); *Kinzli*, 818 F.2d at 1454-55.[4]

We have recognized a "futility exception" to the final decision requirement, under which "the resubmission of a development plan or the application for a variance from prohibitive regulations may be excused if those actions would be idle or futile." *Del Monte Dunes, Ltd. v. Monterey*, 920 F.2d 1496, 1501 (9th Cir.1990); *Herrington*, 857 F.2d at 570. However, this futility exception does not alter a party's obligation to file at least one meaningful development proposal. *Herrington*, 857 F.2d at 569.

In applying this doctrine to the present case, the district court ruled that because the Kawaokas never submitted any formal development plans or filed a specific plan application, their "as applied" challenges were unripe for review. *Kawaoka*, 796 F.Supp. at 1325. This ruling is correct. The Kawaokas cannot argue that the

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[4] The Kawaokas would not be required to meet the second requirement – application for variance – for their claim to be ripe. Under California law, the only way to avoid the specific plan requirement or to change the density designation is to amend the general plan; a variance is not a legally viable option. *See* Cal.Gov't Code § 65906 (West 1983) (prohibiting variance for use not expressly authorized by the zoning regulation governing the land in question); *Herrington*, 857 F.2d at 569-70 (plaintiff not required to seek variance where only way to obtain approval of 32-lot proposal is through amendment of the general plan); *Hoehne v. County of San Benito*, 870 F.2d 529, 534-35 (9th Cir.1989) (variance is not available for exceptions to the general plan).

specific plan requirement imposes "unworkable restrictions on the property, such that it cannot be used and cannot be sold," when they have never applied for a specific plan that has been denied.

The Kawaokas challenge this ruling on several grounds, none of which are persuasive. First, they argue that applying for a specific plan was impossible or futile. Specifically, they contend that the City had no ordinance specifying how a specific plan would be adopted and that they were specifically informed in July of 1990 that they could not at that time apply for a specific plan. While this is true, in May 1991, the City adopted procedures for specific plan applications. Although this occurred after the Kawaokas filed their action in district court, it was a full year before the district court entered its order. It therefore was not impossible or futile for the Kawaokas in the interim to apply for a specific plan.[5]

Moreover, the district court properly concluded that this nine month delay is neither unreasonable nor excessive. We have stated that for a delay to be excessive, it must be substantial, "since the Supreme Court has held a claim to be unripe even where the application process

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[5] The Kawaokas cite *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), for the proposition that the fact guidelines were adopted after they filed their suit did not place a burden on them to subsequently apply for a specific plan. To the contrary, the *Lucas* court stated that such a situation would preclude review if the state court had rested its judgment on ripeness grounds, *id.* at ___, 112 S.Ct. at 2891, as the district court did in this case. The Court considered Lucas's takings claims only because the state court had addressed the merits of these claims. *Id.*

covering a development project required approximately eight years." *Kinzli*, 818 F.2d at 1454 n. 5 (citing to *Williamson County*, 473 U.S. 172, 105 (S.Ct. 3108). Moreover, in the context of takings cases, courts have held that a short term delay in the development or use of property is not unreasonable. *See Agins v. Tiburon*, 447 U.S. 255, 263 n. 9, 100 S.Ct. 2138, 2517 n. 9, 65 L.Ed.2d 106 (1988) (stating that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership' "); *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1206 (N.D.Cal.1988) (one and a half year moratorium is not a taking).

The Kawaokas cite to *Hoehne v. County of San Benito*, 870 F.2d 529, for the proposition that they are not required to seek a legislative amendment to undo that which has just been done by the legislature. In *Hoehne*, the plaintiffs, whose property was zoned to permit subdivision into twelve lots, applied to subdivide their land into four lots. After they were denied, they applied for a subdivision of three lots and were again denied. The City subsequently amended the general plan to permit only one lot on the plaintiffs' sixty-acre parcel. We held that the City had made a final decision with respect to the Hoehne's property such that the Hoehnes were not required to apply for a general plan amendment before they could file a suit. 870 F.2d at 535. *Hoehne* is unhelpful to the Kawaoka's claim because even in *Hoehne*, the appellants had applied to the City to develop their property and been rejected; in the present case, the Kawaokas

have filed no such application. *See Southern Pac. Transp. Co.*, 922 F.2d at 503.[6]

The Kawaokas also cite to *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir.1991), *vacated*, ___ U.S. ___, 113 S.Ct. 31, 121 L.Ed.2d 4 (1992), *on remand*, 987 F.2d 662 (9th Cir.1993), for the proposition that the harm from a substantive due process claim occurs at the time of the government's action. They suggest that this eliminates the requirement that they apply for a specific plan. This argument confuses the ripeness requirement with the doctrine of exhaustion of remedies that was at issue in *Sierra Lake*. The language quoted by the Kawaokas explains that in contrast to individuals who bring claims for procedural due process violations based on random acts of agency officials parties who bring substantive due process claims are not required to exhaust all state remedies prior to seeking adjudication in federal court. *Id.* This doctrine is distinct from the ripeness requirement, which requires that the plaintiff have a final agency decision and therefore a "concrete controversy" before bringing an action in federal court. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir.1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108

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[6] If the Kawaokas' claim is that the specific plan requirement or the RR and SF zoning are unworkable restrictions that render their property unusable, they must first attempt to "use" their property by attempting to prepare a specific plan or to submit a development plan. However, a claim that the general plan's density designation and specific plan requirement are irrational is considered as part of the Kawaokas' facial challenge.

L.Ed.2d 493 (1990); *see also* David R. Mandelker et al., Federal Land Use Law § 2.05[4](h), at 2.58 & n. 106.

Because the Kawaokas' "as applied" challenges to the City's actions are unripe, the district court properly dismissed those claims for lack of subject matter jurisdiction.

II. *Facial Substantive Due Process Challenge*

A. *Standard of Review*

The district court granted summary judgment for the City with respect to the Kawaokas' facial challenges. A grant of summary judgment is reviewed de novo. *Jones v. Union Pac. R. Co.*, 968 F.2d 937, 940 (9th Cir.1992); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir.1987). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether they are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir.1992); *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

To establish a violation of substantive due process, the Kawaokas are required to prove that the City's general plan or temporary water moratorium was " 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.' " *Sinaloa Lake*, 882 F.2d at 1407 (quoting *Euclid v.*

Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)). Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a "clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2387, 69 L.Ed.2d 40 (1981); *see also Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462, 108 S.Ct. 2481, 2489, 101 L.Ed.2d 399 (1988); *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1577 n.14 (11th Cir.1989).

In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether " 'the governmental body *could* have had no legitimate reason for its decision.' " *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir.1993) (citing *Shelton v. City of College Station*, 780 F.2d 475, 483 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 [106 S.Ct. 3276, 91 L.Ed.2d 566] (1986) (emphasis in original)). The City's general plan does not violate substantive due process as long as it advances any legitimate public purpose, *Construction Indus. Ass'n v. Petaluma*, 522 F.2d 897, 906 (9th Cir.1975), and if it is " 'at least fairly debatable' " that the decision to adopt the general plan and the water moratorium was rationally related to legitimate governmental interests, the City's actions must be upheld. *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir.1993) (citations omitted).

Two aspects of the general plan are alleged by the Kawaokas to be irrational and arbitrary: the requirement of a specific plan and the density designation. The

Kawaokas also challenge the City's temporary water moratorium.

B. *Specific Plan Requirement*

The Kawaokas argue that the specific plan requirement is arbitrary and is merely a tool used by the City to prevent development of their land. They argue that the City's reasons for requiring a specific plan are pretextual.

The record supports the City's requirement of a specific plan as a rational planning device. Specific plans are authorized by state law as a mechanism to achieve logical development patterns and to coordinate the provision of infrastructure. Cal.Gov't Code §§ 65450-51. In this case the City has imposed the specific plan requirement on fifty-five acres of land, most of which has been used for strawberry farming for several decades. It is reasonable for a municipality to delay development of this size and type of agricultural property until it planned the development of roads, sewage, disposal, water distribution, drainage, traffic, and utility services. The Kawaokas argue that a specific plan is unnecessary because they do not need to build more roads and because sufficient drainage, sewage, and other resources already exist. Whether or not they are right as to the adequacy of current facilities, requiring a plan to ensure coordinated development of a significant parcel of land and to ensure that adequate resources exist is not irrational. The properties also face the common problem of accumulated pesticide residue in the soil from the history of agricultural use – an environmental problem that the City

clearly will need to address prior to permitting residential development.

The Kawaokas argue that the specific plan requirement is unconstitutional because it obligates them to act jointly with the owners of the other twenty acres prior to developing their own land. While it is true that the specific plan cannot be promulgated in piecemeal fashion, nothing in the California Code requires joint action by parties subject to a specific plan requirement. Moreover, because the specific plan is enacted legislatively, no party can impose his plan on other landowners simply because they are subject to the same plan requirement. Instead, under the City's ordinance an affected individual may submit to the City Council a specific plan for the City's review and adoption, and City regulations specifically state that parties whose property is covered by a specific plan requirement need not act jointly.[7] Thus, landowners subject to a specific plan requirement may submit their

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[7] The Kawaokas argue that the district court misapplied *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir.1984). The district court properly interpreted *Sederquist* to question whether a city may properly require joint action by property owners of a subdivision to satisfy a condition precedent to approval of an application to develop their land. *See Kawaoka*, 796 F.Supp. at 1326. There is no such joint action requirement in this case.

The Kawaokas also argue that the district court found the specific plan requirement to be reasonable only because specific plans are authorized under state law. This mischaracterizes the district court's opinion, which actually found the requirement to be valid because it is a "conceivably rational means of attaining . . . larger community goals." *Id.* at 1326.

proposals either jointly or individually to the City Council, which will enact a specific plan with the features it determines to be most appropriate.

The Kawaokas next argue that the specific plan requirement is unconstitutional because (1) the City imposes a fee on property owners for developing the specific plan, and (2) the City, which is the only party authorized to prepare a specific plan, refuses to do so and instead requires the Kawaokas to do it, thus holding their land hostage. With respect to the first claim the fact that the City imposes a fee for the development of specific plans is not a constitutional deprivation. *See* Cal.Gov't Code §§ 65456(a) & (b) (West. Supp.1994). Cities often impose permit requirements and assess processing costs on individuals, particularly on those who seek to develop their land. The rationale behind this fee is clear: a party receives significant economic benefits from developing her land; the taxpayers should not bear all of the costs of planning such a development. *See* Cal.Gov't Code § 65456(a) (West. Supp.1994) (stating that it is the legislature's intent that people who benefit from a specific plan pay some of the costs of developing these plans).[8]

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[8] The Kawaokas cite *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir.1990), for the proposition that the City may not require them to pay fees to regain viable use of their land. This case is inapplicable. *Harris* is a procedural due process case in which a local planning agency specifically rezoned the plaintiffs land by revising the general plan without providing notice to the plaintiff. *Id.* at 501-04. In *Harris* we recognized that the only way in which the plaintiff could object to the general plan amendment would be to pay an application fee to reamend the plan. Because the plaintiff was not warned during the planning process that his property had been targeted specifically for

The record does not support the Kawaokas' second claim. We have already noted that the City ordinance does not state that only the City may prepare a specific plan, but instead provides that property owners may submit their own. The Kawaokas' argument actually reflects the fact that they are unwilling to pay any of the costs of developing a specific plan, and not that the City refuses to prepare a plan at all or to consider one prepared by the Kawaokas.

Throughout their brief, the Kawaokas argue that their land has been deprived of all economic value. The record does not support this claim. Instead, it reveals that the Kawaokas are unwilling to sell their land for less than $6 million. Furthermore, an appraisal performed in February 1991 of thirty-six acres of their property estimated its value at $2,400,000. This is certainly much less than $6 million, but it is nonetheless substantial value.

C. *The Rural Residential Designation*

In adopting the general plan, the City advanced several objectives, including preserving the agricultural heritage of the City, providing for a range of housing types and densities, preserving the "small town" character of the City, and limiting development within the City to levels consistent with available resources. Our circuit and

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rezoning, he was denied procedural due process. *Id.* In the present case, the Kawaokas were apprised of the proposed general plan amendments and they participated fully in the hearing process. They do not have a procedural due process claim.

others have established that these are legitimate objectives. *See Christensen*, 995 F.2d at 165 (preserving agricultural uses of land); *Smithfield Concerned Citizens for Fair Zoning v. Smithfield*, 907 F.2d 239, 244-45 (1st Cir. 1990) density restrictions may enhance quality of life); *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir.1988), *cert. denied*, 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 193 (1989) (preserving bucolic atmosphere); *Petaluma*, 522 F.2d at 906 (preserving small town character). Moreover, designating seventeen acres for rural residential density is a reasonable means by which the City may reduce potential traffic problems and address the anticipated water shortage due to population growth.

The Kawaokas raise several challenges with respect to the density designation of their property. First, they argue that the general plan did not in fact designate their property RR and SF, but instead retained the agricultural designation until the Kawaokas prove such use is economically non-viable. We have already noted that while the language of the general plan suggests that the property was designated for agricultural use, the plan map, the City Council meeting minutes, and the statements of city officials all indicate that the property was designated RR and SF. *See* note 2, *supra*. Even the Kawaokas' real estate agent and potential purchaser appear to understand that the property has been designated for residential use, as demonstrated by their respective letters which object to the dual designation and offer less money for the property in recognition of the RR and SF designations.

The Kawaokas also contend that the ambiguity created by the plan's language and map render the plan

unconstitutionally vague. The plan is not unconstitutionally vague, however, because consultation with city officials resolved any ambiguity regarding the meaning of the general plan. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982) (stating that regulations are not unconstitutionally vague where "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry"); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 48-49, 86 S.Ct. 1254, 1263, 16 L.Ed.2d 336 (1966) (statutory definition of "related person" is not unconstitutionally vague when appellants have access to an agency process that will clarify the issue).

The Kawaokas next argue that designating half of their property "RR" is impermissible "spot zoning" because it is inconsistent with surrounding uses. Spot zoning occurs where "a small parcel is restricted and given lesser rights than the surrounding property . . . thereby creating an 'island' in the middle of a larger area devoted to other uses."[9] *Consaul v. City of San*

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[9] According to the California courts,

> Usually spot zoning involves a small parcel of land, the larger the property the more difficult it is to sustain an allegation of spot zoning. Likewise, where the 'spot' is not an island but is connected on some sides to a like zone the allegation of spot zoning is more difficult to establish since lines must be drawn as some point. Even where a small island is created in the midst of less restrictive zoning, the zoning may be

Diego, 6 Cal.App. 4th 1781, 1801, 8 Cal.Rptr.2d 762 (Cal.Ct.App.1992).

The Kawaokas' spot zoning challenge fails for several reasons. First, "spot zoning" refers to property that is small in size. *See Hamer v. Ross*, 59 Cal.2d 776, 382 P.2d 375, 31 Cal.Rptr. 335 (1963) (2.2 acres zoned for 1 unit per acre where all surrounding lots are much smaller); *Ross v. City of Yorba Linda*, 1 Cal.App. 4th 954, 960, 2 Cal.Rptr.2d 638 (Cal.Ct.App.1991) (1.12 acre lot zoned for 1 unit per acre where surrounding lots generally half that size). On the facts presented, the Kawaokas' seventeen acre parcel is too large to be considered spot zoning.

Furthermore, this case is unlike spot zoning cases, in which " 'a lot in the center of a business or commercial district is limited to uses for residential purposes.' " *See Consaul*, 6 Cal.App. 4th at 1801, 8 Cal.Rptr.2d at 775 (citations omitted); *see* also *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928) (zoning 100 foot strip of 3/4 acre lot for residential use where strip is surrounded by industrial use is unreasonable). The Kawaokas' property is surrounded by a variety of other types of residential property, including R-1 (single family residential), R-2 (duplex residential), and R-3 (multi-family residential). It will not be a small island amid land zoned for dissimilar uses.

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upheld where rational reason in the public benefit exists for such a classification.

Consaul v. City of San Diego, 6 Cal.App. 4th 1781, 1801-02, 8 Cal.Rptr.2d 762 (Cal.Ct.App. 1992) (quoting *Viso v. State of California*, 92 Cal.App.3d 15, 22, 154 Cal.Rptr. 580 (Cal.Ct.App. 1979) (citations omitted)).

Not only is there no support in the case law to find spot zoning in this case, but to define spot zoning to include zoning of parcels of this size would paralyze urban planners, who under certain circumstances need to draw lines and differentially zoned much smaller areas of land than this.

The Kawaokas argue that the district court failed to consider their declarations, in which representations are made that there is adequate infrastructure to accommodate development at the density they requested. Even if this were true, the Kawaokas fail to state a due process violation because there is no law requiring the city to zone property for maximum use and density. Such an approach to land use planning would prohibit municipalities from zoning property for anything less than maximum development, and approach that has clearly been rejected.

D. *The Water Moratorium*

The Kawaokas next argue that the City's water moratorium was arbitrary and a mere pretext for blocking development on their property. They cite to Johnson's declaration, in which he states the Paul Karp, a city engineer, told him that the City was using water as a pretext to stop development. This claim fails for several reasons.

First, as the district court noted, the temporary moratorium lasted only a year; it merely limited new development plans during that time period and did not in any way restrict the processing of specific plans. Because the Kawaokas may not develop their property until a specific

plan is prepared, and because the moratorium did not deter the processing of specific plans, the water moratorium did not delay any development efforts by the Kawaokas. But even if it could be argued that the moratorium delayed development of their property for one year, such a short-term delay does not rise to constitutional dimensions. *See Agins*, 447 U.S. at 263 n. 9, 100 S.Ct. at 2143 n. 9; *Zilber*, 692 F.Supp. at 1206.

The record also supports the City's decision to enact the water moratorium as a rational one. Although the Kawaokas point to a declaration that the water moratorium was a pretext for preventing development, the City points to estimates by its Department of Public Works that if all pending development applications were approved, it would fact a water shortage of 637 to 833 acre feet per year. Given the serious drought conditions and water shortages faced by California cities, we cannot say that the City's efforts temporarily to limit development while it studies its future water supply is irrational.

Except for a declaration that merely asserts that the moratorium is pretextual, the Kawaokas do not provide any evidence that this is so.[10] This case is therefore unlike

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[10] The Kawaokas argue that the district court was incorrect in holding that they were required to submit expert affidavits to counter the City's water experts. The existence of a water shortage is precisely the type of issue on which expert testimony is necessary. But even if expert testimony is not mandatory, the Kawaokas only point to a hearsay statement attributed to Paul Karp, a city engineer, that the water shortage is a pretext used to limit development. They provide no numerical data or direct evidence to suggest that the City's numbers are contrived or inaccurate.

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990), the case cited by the Kawaokas. In *Lockary*, we held that a moratorium on new water hookups might be arbitrary where the plaintiffs demonstrated that during the moratorium water use increased by 70%, water storage capacity increased by 1100%, the city had provided water for swimming pools, the city had voluntarily relinquished rights to certain water sources, and the leakage rate for the City's water was at least twice normal. *Id.* at 1155-56. Unlike the plaintiffs in *Lockary*, the Kawaokas provide no evidence to suggest that the City's numbers are in fact contrived.

The Kawaokas also argue that they have evidence that demonstrates that if their property is converted to residential use at 5.0 units/acre, it would still require less water than they currently use for strawberry farming. Assuming this is true, these numbers do not make a one year water moratorium irrational or pretextual. The record supports the City's argument that in enacting the moratorium, the City was responding to a perceived water shortage faced by the entire community. *See Barancik*, 872 F.2d at 836-37 (zoning ranch area to preserve rural landscape is not irrational merely because as many cows would graze on plaintiff's property if there were twenty-eight residences as would graze if there were nine). The record simply does not support the contention that the one-year moratorium (now expired) was mere pretext for preventing all development on the Kawaokas' property.

E. *Summary*

We conclude that the Kawaokas have failed to plead or present sufficient evidence to allow their substantive due process challenges to go to trial. The Kawaokas cite to several cases for the proposition that they are entitled to a jury trial and that summary judgment is inappropriate. However, unlike those cases, in which we found that the plaintiffs did in fact provide some evidence suggesting that a city's actions were irrational, the Kawaokas have failed to provide such evidence. *See Del Monte Dunes*, 920 F.2d 1496 (city acts irrationally where it approves 190 unit project provided that fifteen conditions are met, plaintiffs fulfill those conditions over an eighteen month period, and city denies permit, giving only conclusory explanation); *Lockary*, 917 F.2d 1150 (water moratorium may be arbitrary where city has significantly increased provision of water to other parties); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir.1988) (city's refusal to issue building permit is irrational where Bateson meets all of the requirements for the permit and city regulations require the city to issue a permit in these circumstances). Furthermore, this is not a takings case, in which we must balance the public interest supporting the government action against the severity of the private deprivation; in a substantive due process case such as this, our concern is with the rationality of a government action regardless of its impact. *See* Kenneth H. Young, 1991 Zoning & Planning Law Handbook §§ 7.02-7.03 at 144-45 (1991); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n. 3, 107 S.Ct. 3141, 3147 n. 3, 97 L.Ed.2d 677 (1987). The takings cases cited by the Kawaokas that discuss the need to

consider the harm to the plaintiff are therefore inapplicable.

Because the Kawaokas do not raise a genuine issue of material fact as to whether the City's general plan and water moratorium are irrational or arbitrary, the district court properly granted the City's motion for summary judgment with respect to the Kawaokas' substantive due process challenges.

III. *Equal Protection Challenge*

The Kawaokas claim that the City's actions were motivated by a racial bias against persons of Japanese ancestry. They also argue that even if the actions were not race-based discrimination, the City's actions discriminated against farmers and were arbitrary.

A. *Evidence of Racial Discrimination*

"Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race . . . [courts] presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). Because zoning and land use issues do not implicate fundamental rights, *Christian Gospel Church, Inc. v. San Francisco*, 896 F.2d 1221, 1225 (9th Cir.), *cert. denied*, 498 U.S. 999, 111 S.Ct. 559, 112 L.Ed.2d 565 (1990), in order to invoke strict scrutiny in this case the Kawaokas

must demonstrate that the City intentionally discriminated on the basis of race. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). Discriminatory intent may be proved by direct or indirect evidence. *Id.* at 266, 97 S.Ct. at 563; *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 471 (9th Cir.1991).

The strongest evidence of discriminatory intent consists of two statements made by Doris Olsen, a member of the City Council, to Stephanie Forrest, the Kawaokas' real estate agent, and Cheryl Christner, Ms. Forrest's assistant. Forrest contends that when informed that the City's designation of the Kawaokas' property had decreased its value, Olsen stated "Why should these Japanese people make all that money?" and "Why should these people make so much money?" (CR 35, Exh. 19). These deplorable remarks are insensitive and disturbing and are evidence of prejudice. However, they are insufficient to raise a claim that the governmental action was on account of racial discrimination.

The district court analogized this situation to *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d at 465. *See Kawaoka*, 796 F.Supp. at 1330-31. In *Henderson*, a president of a minority-owned bank sued a federal bank regulator who encouraged the bank's board of directors to fire the president. 940 F.2d at 465. To support his claim of racial discrimination, the plaintiff pointed to a statement by the bank regulator from which one might infer discriminatory intent. Because we found rational reasons for the regulator's actions, including a federal report on the bank

that stated that the president's "unsatisfactory management has resulted in the bank's current insolvent condition," we ruled that one statement without additional evidence of racial discrimination was insufficient to state a claim. *Id.* at 469, 473 & n. 16. In the present case, given the many reasons articulated by the City to support its decisions, including the desire to preserve agriculture and the City's small-town character, its concern that infrastructure might not support immediate development, and its concerns about the water adequacy and increase in traffic, Olsen's repugnant statements are insufficient to demonstrate that she acted with discriminatory intent.

Furthermore, the fact that Olsen made two deplorable comments off-duty does not mean that the *City* may be held liable for discrimination. A municipality may only be held liable under § 1983 for a violation that stems from "official municipal policy." *Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Municipal liability attaches where there is a deliberate choice made by officials with responsibility for establishing final policy, and the question of who has final decisionmaking authority is a question of state law. *City of St. Louis v. Prapotnick*, 485 U.S. 112, 124-27, 108 S.Ct. 915, 924-26, 99 L.Ed.2d 107 (1988). Under California law, Olsen did not have final decisionmaking authority because the City Council must adopt a general plan by a majority vote. Cal.Gov't Code § 65356 (West Supp.1993). In this case, the council adopted the plan unanimously and there is no evidence that any other council member acted with discriminatory intent or that the council as a whole took the action with discriminatory

intent. *See Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 878-79 (9th Cir.1987), *cert. denied*, 488 U.S. 827, 109 S.Ct. 79, 102 L.Ed.2d 55 (1988) (county supervisor who votes on issue even though he had a conflict of interest does not have authority to establish county policy where board of supervisors may only act by majority vote).[11]

The Kawaokas point to additional indirect evidence of racial animus, but this evidence is extremely weak. Specifically, they point to statements by Craig Kawaoka that he had observed racial discrimination against other Japanese individuals. Most of these alleged incidents of discrimination concern conditions that the City placed on the development of property owned by other Japanese landowners and are quite vague.[12] These incidences are

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[11] The Kawaokas also argue that the district court was incorrect in ruling that the city council members were absolutely immune from liability for legislative acts because their actions were not legislative in nature. See Kawaoka, 796 F.Supp. at 1332. The district court correctly noted that zoning enactments that affect large populations are legislative in nature. *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982). Adopting the general plan and the water moratorium, both of which affected the entire community of Arroyo Grande, were legislative acts. Appellants provide no evidence that suggests that the City acted separately from the general plan amendment to single out the Kawaokas for special treatment. *See Harris*, 904 F.2d at 501-02 (city acts to rezone plaintiff's land, without notice, after third party requested a change in zoning); *see also Bateson*, 857 F.2d at 1303 (city's refusal to issue specific building permit is executive act).

[12] Mr. Kawaoka first refers to his friend Tom Ikeda, who was required to put in a pipeline or a drainage before he could complete a development project. Ikeda informed Kawaoka that

not sufficient evidence of discrimination because it is not unusual for property to be down-zoned or for development to be subject to conditions. Unless the Kawaokas can demonstrate that non-Japanese property owners are permitted to develop their land without similar restrictions, we cannot conclude that the City's actions in these cases were racially-motivated or unreasonable.

B. *Rationality Review*

When there is insufficient evidence of racial discrimination, we review the City's actions to determine whether the Kawaokas' property has been treated differently from similarly situated property and whether there is any rational basis for such treatment. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991); *Christian Gospel Church*, 896 F.2d at 1225.

The Kawaokas' equal protection claim must fail because there is no evidence in the record that property similar to the Kawaokas was treated differently. Unfortunately for the Kawaokas, it may be impossible to provide this evidence, as the Kawaokas' land and the

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when his uncle complained that the conditions were blackmail, the City replied "just think of it as payment to the City." Next, Kawaoka states that his brother spoke with Gary Kobara, who was also required to meet certain unspecified conditions which he felt were unnecessary before he received final approval for a development. Third, Kawaoka stated that he observed that Chio Okui's property was repeatedly downzoned and that the City repeatedly placed numerous conditions for development on the property. He also stated that Hilo Fuchiwaki cannot get his land designated for residential use.

neighboring twenty acres are in fact unique in Arroyo Grande.

However, the record also does not support the claim that the Kawaokas were singled out for special treatment as compared to owners of nonagricultural property. The Kawaokas argue that they were treated unfavorably at the City Council hearings because other property owners' requests for amendments to the general plan were granted. For example, they contend that the City inappropriately approved a high-density apartment complex on a steep hillside. Assuming this to be true, we cannot conclude from this fact that the City's RR designation of the Kawaokas' property is discriminatory. Minutes from the City Council meetings indicate that while the Council granted many requests for amendments, it also refused to grant several landowners the designations that they requested. For example, the record reflects that the Ellsworth property was forced to remain agricultural, an Alder Street property was denied its desired condominium designation, and the Stillwell property was designated RR rather than SF. The minutes also reflect that in most cases, the City Council merely accepted the recommendations of the Planning Commission. Finally, the general plan map also indicates that a specific plan requirement was imposed on at least six separate parcels of land, demonstrating that the City did not single out the Kawaokas to impose a specific plan requirement.

In the end, even if the Kawaokas were singled out for different treatment, the City has provided a rational explanation for why the general plan treats the

Kawaokas' property as it does. The specific plan requirement permits the City to coordinate roads, sewage disposal, utilities, easements, drainage and water distribution. And the density designation serves to preserve agriculture, to limit development, and to provide for a range of housing types.

Because the Kawaokas were unable to provide sufficient evidence to suggest that the City intended to discriminate on the basis of race, and because the Kawaokas did not demonstrate that they were irrationally singled out for differential treatment, the district court properly granted summary judgment for the City on the Kawaokas' equal protection claim.

CONCLUSION

We hold that the Kawaokas' "as applied" challenge is not ripe for review. We also hold that there are no genuine issues of material fact as to any of the Kawaokas' substantive due process or equal protection claims against the City. Accordingly, the district court's order granting the City's motion for summary judgment is AFFIRMED.

Kingo KAWAOKA and Tatsumi Kawaoka, Plaintiffs,

v.

The CITY OF ARROYO GRANDE, the City Council of Arroyo Grande, Mark M. Millis, B'Ann Smith, Gene Moots, A.K. Dougall, Doris Olsen, Defendants.

No. CV 90-4465 Kn (Ex).

United States District court,
C.D. California.

April 30, 1992.

Landowners brought action against city challenging density designation in update to general plan. On cross motions for summary judgment, the District court, Kenyon J., held that: (1) challenge was not ripe for review; (2) city's actions did not violate substantive due process; (3) city's actions did not violate equal protection; and (4) individual council members were immune from liability.

City's motion granted and landowner's motion denied.

John B. Murdock, Santa Monica, Cal., for plaintiffs.

Judy Sk[illegible]sen, City Atty., City of Arroyo Grande, Katherine E. Stone, Margaret Moore Sohagi, Philip A. Seymour, Freilich, Stone, Leitner & Carlisle, Los Angeles, Cal., for defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

KENYON, District Judge.

The Court, having received and considered both defendants' and plaintiffs' motions for summary judgment, and the papers filed in support thereof and opposition thereto, GRANTS defendants' motion for summary judgment and DENIES plaintiffs' motion for summary judgment.

In making these rulings, the Court makes the following findings of fact. For approximately 38 years, plaintiffs have owned and primarily farmed 35 acres of strawberry fields located along the southern border of Arroyo Grande. Adjacent to plaintiffs' parcel are 20 additional acres under three separate ownerships, some of which have also been used for strawberry farming. From October of 1990 to July of 1991, plaintiffs leased the farmable portion of their land (28 acres) to a company that continued to grow strawberries on the property. Plaintiffs' land is currently leased to a third-party who is attempting to farm cabbage, although the land remains cultivated for strawberries.

In 1988, the City began to update its general plan, a comprehensive, land-use planning device required of every city by state law. Cal.Govt.Code §§ 65300-65359. After preparing numerous workshops, interviews, public opinion surveys, interviews, and public hearings, and informing the public of proposed general plan changes, the City arrived at a revised general plan, the primary goal of which is to preserve the town's traditional rural and agricultural atmosphere.[1]

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[1] The general plan states; "It is the fundamental goal of the City of Arroyo Grande to achieve a community which:

In accordance with the general plan objectives, the City designated large portions of land for continued agricultural use, including the subject 55 acres. However, in response to concerns regarding the long-term viability of agriculture on the parcel, the City added to the draft general plan Land Use Element Policy 1.5, which states:

> "At such time as they are no longer economically viable, permit the conversion of the existing strawberry fields located south of Grand Avenue near the western city limits to urban use subject to preparation of a specific plan as set forth in Government Code Sections 65450-65457 . . .
>
> a. If converted, utilize the northerly portion of the property adjacent to Grand Avenue for commercially-related uses.
>
> b. If converted, utilize the southerly portion of the property for single family residential (less than 5.0 dwelling units per gross acre) and rural residential (less than 2.0 dwelling units per gross acre) uses."

Beginning April 9, 1990, the City Council initiated hearings to review the draft general plan. Plaintiffs, represented by their consultant Burtram Johnson ("Johnson"), appeared at several of these hearings to present evidence that agriculture is not economically viable on

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[p]romotes a rural, small town atmosphere and retains Arroyo Grande's traditional ties to agriculture[,] [r]ecognizes limitations upon the natural resources necessary to support urban and rural development, and lives within those limits[,] [and] [a]commodates a balance and variety of urban and rural lifestyles . . . "

the subject property and to request the conversion of the property from an agricultural to a residential designation. Plaintiffs also lodged an objection to the Policy 1.5 specific plan requirement.

In response to plaintiffs' requests, the City Council changed the land use designation of all 55 acres. The 20 acres surrounding the plaintiffs' plot were converted from agricultural to residential and/or commercial. Plaintiffs' property was divided into two residential classifications; the northern portion was designated "SF" (single family, 4.5 units per acre maximum) while the southern portion was designated "RR" (rural residential, 1.0 unit per acre maximum). In addition, the City Council maintained the specific plan requirement for all 55 acres.

On May 22, 1990, the City both adopted the general plan update by a five to zero vote and enacted a 45 day water moratorium imposing restrictions on some development applications within the City.[2] Then, on June 26, 1990, the City Council extended the water moratorium by ten months and 15 days, to expire by its own terms in May of 1991.

After the adoption of the general plan, Lee Webb ("Webb") offered to buy plaintiffs' land for $3,735,000, although he quickly retracted the offer upon learning that

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[2] The City made the following findings in support of its water moratoria. As of May 1990, reliable City water supplies totaled 3,492 acre feet per year. To grant all development applications authorized as of that time would require between 4,415 and 4,611 acre feet per year. Even considering conservation measures, permitting all development applications to proceed would result in a shortfall of 637 to 833 acre feet per year.

any development of the land would require the submission of a specific plan. The record indicates, however, not only that plaintiffs did or would have rejected the $3,735,000 offer, but also that they subsequently declined to advertise the property or list it on any real estate exchange, in spite of their intent to sell the property for development.

In addition, at no time during the relevant period did plaintiffs either prepare (or ask the City to prepare) a specific plan for their property or file a formal zone change or development application. Although plaintiffs claim the lack of available application procedures accounts for their inaction, on May 14, 1991, approximately one year after the adoption of the general plan, the City passed the Arroyo Grande Development code, including procedures for adopting and amending specific plans.

I. Summary Judgment Legal Background

According to FRCP 56(c), a court shall grant summary judgment if there is enough information on the record to show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the initial burden of proving, based on the total record, an absence of genuine factual issues for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the nonmovant must present concrete evidence, without merely relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson v. Liberty Lobby*, 477 U.S.

242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). In addition, expert affidavits must be countered by expert affidavits in order to create a triable issue of fact. *Jones v. Wike*, 654 F.2d 1129, 1130 (5th Cir.1981). Finally, "[n]either a desire to cross-examine an affiant nor an unspecified hope of undermining his/her credibility suffices to avert summary judgment." *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95 (9th Cir.1983).

II. Whether the Instant Action is Ripe for Review

In the Ninth Circuit, a challenge to a land-use regulation is unripe until the property-owner submits at least one meaningful application for development. *Southern Pacific v. City of Los Angeles*, 922 F.2d 498 (9th Cir.1990); *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988) [Referring to the ripeness finality requirement, the court noted, "[a] final decision requires at least: '(1) a rejected development plan, and (2) a denial of a variance.' "] In addition, "a landowner may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed." *Del Monte*, 920 F.2d 1496, 1501. Finally, although the *Southern Pacific* court does elaborate on a "futility exception" exception to the general rule, "[t]he futility exception does not alter an owner's obligation to file one meaningful development proposal." *Southern Pacific*, 922 F.2d 498, 504; *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *accord Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (9th Cir.1990).

Because plaintiffs here never submitted any formal development application, failing to meet the Ninth Circuit threshold requirement for finality, the instant action does not appear ripe for this Court's review. Although plaintiffs' repeatedly argue that government action violates substantive due process at the moment the harm occurs, rendering their action ripe upon the adoption of the updated general plan, they fail to realize that for their "as applied" challenge, a showing of injury requires, at the very least, one application for development.

Plaintiffs also argue that both the City's one year water moratorium and its one year lag in passing a formal development Code excessively delayed the development of plaintiffs' property. Their argument fails for two reasons. First, neither the water moratorium, which did not prevent landowners' from filing specific plan applications, nor the City's delay in passing its Development Code, which arguably only supplemented already sufficient specific plan procedures, excused plaintiffs' failure to make a formal development application. Second, to the extent that specific plan application procedures were unavailable in 1990, the City's one year delay in passing the formal Development Code was not unreasonable. *Agins*, 447 U.S. 255, 262, n. 9, 100 S.Ct. 2138, 2143 n. 9 ("[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay are incidents of ownership"). In *Zibler v. Town of Moraga*, 692 F.Supp. 1195, 1207 (N.D.Cal.1988), the Ninth Circuit found that "a one-and-a-half-year development moratorium in order to develop a comprehensive scheme for regulating open space seems neither unreasonable, nor,

standing alone, sufficiently burdensome to require compensation." Moreover, under California Government Code § 65858, a legislative body may adopt for as long as two years an interim urgency measure prohibiting uses which may be in conflict with a general plan.

Therefore, because plaintiffs failed to utilize their clear opportunity to file an application for development, the instant action appears unripe. Even if ripe, however, plaintiffs' challenge still fails on the merits of its substantive due process and equal protection causes of action.

III. Plaintiffs' Substantive Due Process Cause of Action

A. Standard of Review

"To establish a violation of substantive due process, the plaintiffs must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Sinaloa Lake Owners Assn. v. Simi Valley*, 882 F.2d 1398, 1407 (9th Cir.1989). Furthermore, "[i]n adjudicating substantive due process challenges to zoning ordinances, a court asks only whether a *conceivable* rational relationship exists between the zoning ordinance and legitimate governmental ends." *Smithfield Concerned Citizens v. Town of Smithfield*, 907 F.2d 239, 245 (1st Cir.1990); *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir.1990).

B. Whether the City's Actions Served Legitimate Governmental Ends

The City was pursuing legitimate governmental goals when it initiated the process of updating its general plan.

Protecting the environment, preserving open space and agriculture, and regulating the quality of a community by limiting development are all legitimate public ends. *Agins v. Tiburon*, 447 U.S. 255, 261, 100 S.Ct. 2138, 2142, 65 L.Ed.2d 106 (1980) [the development of local open space plans], *Smithfield Concerned Citizens*, 907 F.2d 239, 244-245 ["controlling both the rate and character of community growth is the very purpose of land use regulation"], *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir.1988). As mentioned above, the City's stated goals in revising its general plan were to preserve a small-town agricultural community, to accommodate a mix of residential densities, and to limit development in accordance with available resources. Although plaintiffs claim the City's actual motivations were racially-oriented and belied the official goals of the General Plan, plaintiffs fail to substantially support their assertion with evidence on the record. Therefore, under the relevant case law, the purposes of the City's land-use decisions and actions are clearly legitimate.

C. Whether the City's Regulatory Actions Were Conceivably Rational Means of Accomplishing its Legitimate Stated Goals

1. *The Specific Plan Requirement*

There exists a conceivably rational relationship between the City's imposition of a specific plan requirement on the subject 55 acre parcel, as well as on other town properties, and the City's regulatory goals. Article 8 of the California Government Code, "Specific Plans," specifically authorizes and defines the scope of specific

plans. Section 65450 of the article states that specific plans are "for the systematic implementation of the general plan for all or part of the area covered by the general plan." Specific plans are to accomplish this implementation by coordinating the infrastructure (sewage, transportation, etc.) of local areas. Cal.Govt.Code § 65451. Therefore, the City's act of requiring a specific plan for the development of the 55 acres at issue is clearly a conceivably rational means of attaining its larger community goals.

Plaintiffs, however, argue that the absence of any specific plan application procedures, fee schedules, or guidelines, as well as the subsequent year-long delay in developing such a program, excuses their inaction and renders the requirement itself arbitrary and irrational. As argued in the ripeness section, however, plaintiffs are nevertheless unjustified in failing to submit at least one application for development. In addition, the case law suggests that a one year delay is by no means unreasonable. Finally, plaintiffs' claim that *no* specific plan procedures existed at the relevant time is not entirely accurate. Although the City did not pass the Arroyo Grande Development Code code until May of 1991, California Government Code §§ 65450-65457 establish guidelines as to what a specific plan (application) must contain. The updated General Plan itself also provides insight into the general planning policies plaintiffs, would be required to consider.

Plaintiffs also assert that the City's specific plan requirement forces them to act jointly with their neighbors on the 55 acre tract and is therefore arbitrary and unreasonable. To support their "joint action" claim, they

rely on *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir.1985), which dealt with a City joint action requirement in an illegal subdivision. Unlike subdivisions, however, specific plans require no joint action on the part of property-owners. Nothing in California law, which very clearly authorizes the specific plan as a land-use planning tool, requires the plaintiffs to act in concert with their neighbors. In fact, what *Sederquist* questioned was not a city's ability to "require 'proper planning' for utilities, roads, sewers, etc. before a home can be built," but only the propriety of requiring property-owners in an illegal subdivision to act jointly to achieve such ends. *Sederquist*, 765 F.2d 756, 761. Therefore, plaintiffs' joint action argument is unpersuasive.

2. *The City's Re-designation of Plaintiffs' Property*

The City's act of converting plaintiffs' land from an agricultural designation to a medium-density residential classification (sections of 1.0 and 4.5 units per acre) certainly is rationally related to the twin goals of preserving a rural community and permitting development only in accordance with available resources. Plaintiffs' redesignation appears both to promote a small-town atmosphere and to permit development only to the extent allowable by the region's infrastructure and resources. In the *Smithfield* decision, for instance, 4.6 and 2.6 acre minimum parcel sizes were rationally related to the government's broad public safety and welfare goals, regardless of whether the government's action was the most effective way of achieving such goals. Despite the fact that they received a designation that permits 83 units on 35

acres in a traditionally rural region, plaintiffs attempt to argue that the City's rezoning decision is arbitrary and irrational.

Preliminarily, plaintiffs suggest that the City's density requirement is not only less than densities in neighboring cities, but also is actually motivated by an anti-development bias, not by resource constraints. Defendants respond effectively with the following arguments: (a) plaintiffs never raised this "density" argument in their original amended complaint, (b) plaintiffs fail to provide legal support indicating that Arroyo Grande must imitate the land-use decisions made in other cities, and (c) plaintiffs supply no evidence of illicit motive sufficient to outweigh the deference due the City's findings regarding available resources and advisable development.

Plaintiffs also claim the effect of the City's density decision was to "spot zone" their property. In support of their position, plaintiffs rely only on two *state* court cases, *Hamer v. Town of Ross*, 59 Cal.2d 776, 31 Cal.Rptr. 335, 382 P.2d 375 (1963) and *Ross v. City of Yorba Linda*, 1 Cal.App.4th 954, 2 Cal.Rptr.2d 638 (1991), which involve plaintiffs with plots of land restricted to a maximum density of one unit/acre though surrounded by parcels of lesser size. Plaintiffs' attempt to analogize these spot-zoning cases is unavailing for three reasons. First, unlike the state cases *supra*, plaintiffs' 35 acre tract cannot be considered a "spot." "Spot zoning is '[w]here a *small* parcel is restricted and given less rights than the surrounding property . . . ' " (emphasis added) *Ross*, 1 Cal.App.4th 954, 2 Cal.Rptr.2d 638 (1991). Second, plaintiffs fail to provide the Court with adequate information

as to the the specific densities permitted in the surrounding parcels, leaving the Court without means by which to draw comparisons. Third, plaintiffs again have raised a cause of action that they failed to plead in their original complaint.

Finally, plaintiffs repeatedly attempt to argue that, although the City has already redesignated their land (there is no factual disagreement here), the literal language of the adopted general plan still requires plaintiffs to make a showing that the continued agricultural use of their land is economically non-viable. Although the adopted general plan does, technically, contain a provision about proof of economic non-viability in Policy 1.5, plaintiffs' claim fails for several reasons.

As stated in the declarations of City Attorney Judy Skousen ("Skousen"), planning consultant Lloyd B. Zola ("Zola"), and City Planning Director Doreen Liberto-Blanck ("Liberto-Blanck"), the City *did* accept plaintiffs' request for a zone change, thereby clearly and implicitly accepting their argument that agriculture is no longer viable on the subject property.[3] It is also clear from the minutes of the April 25, 1990 City Council meeting that the City Council accommodated plaintiffs' request.[4]

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[3] Liberto-Blanck declares, "It is my understanding that the Kawaokas do not have to show the City of Arroyo Grande that agriculture is no longer economically viable before converting from an agricultural use to a residential use. The Kawaokas property is designated residential under the general plan."

[4] With reference to the 55 acre lot, the minutes state, "After additional discussion it was moved by Olsen/Smith and the motion carried to accept the staff's recommendation of

Plaintiffs, in other words, got at least part of what they wanted; the City accepted their original proof of economic non-viability and required nothing more.

Plaintiffs' are also misguided in their claim that the adopted general plan is unconstitutionally vague as a result of its apparent requirement that they prove economic non-viability for a second time. A general plan is not a *law,* but a tentative *plan,* subject to change. *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111 (1973). It seems inappropriate to consider a general plan unconstitutionally vague when a general plan is, by definition, general. Therefore, plaintiffs' unconstitutional vagueness claim, which again never appeared in their original complaint, is unconvincing.

3. *The City's Imposition of a Temporary Water Moratorium*

Plaintiffs' argument that the City's approximately year-long water moratorium (1990-91) was part of its concerted effort to halt the development of plaintiffs' property, contributing to their financial demise, is barely relevant at best.

The water moratorium argument has a weak connection to the causes of action plaintiffs pleaded originally. It expired in May of 1991, rendering moot any subsequent claim for declaratory or injunctive relief. Moreover, there is virtually no connection between the moratorium and

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commercial, single family and rural residential designations with a specific plan."

plaintiffs' claim for damages. Any failure to develop during 1990-91 was due not to the moratorium but to plaintiffs' own failure to submit either a specific plan or an application for a moratorium exemption.[5]

In addition, plaintiffs are unsuccessful in their attempt to analogize the instant case to *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir.1990), which held there were triable issues of fact as to whether the city's enactment of a moratorium on new water hookups for undeveloped land was arbitrary and selective. Plaintiffs in *Lockary* presented affidavits showing that after the moratorium was imposed, water use increased 70%, the city voluntarily provided water for secondary uses such as swimming pools, and third parties situated similarly to plaintiffs received water while plaintiffs did not.

In contrast, plaintiffs here present insufficient evidence that the water moratorium was pre-textual and targeted specifically toward thwarting the development of their property. Plaintiffs' best evidence is Craig Kawaoka's declaration that, according to *his* water consumption records, his family would consume less water in development than in agriculture. Plaintiffs also occasionally argue that the City's findings of a water shortage fail to consider the fact that agriculture requires more water than does land-development. Without supporting affidavits from a water-use expert to reliably controvert City findings, however, plaintiffs' claims are unavailing.

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[5] The moratorium temporarily halted new development applications, but not applications for specific plans.

Plaintiffs have not provided this Court any basis to consider the City's water moratorium anything but a conceivably rational response to a water shortage. As Zola states in his declaration, the moratorium was necessary because the City did not have enough water to accommodate the development permitted under the updated general plan (see footnote 2).

Therefore, plaintiffs' attack on the moratorium is not only myopic (in that it focuses primarily on the sufficiency of water levels for the development of *plaintiffs'* property), but also largely irrelevant given that the City granted plaintiffs' request to develop their property, albeit at more moderate densities than requested.

A. The City's Actions are Presumed Valid; Plaintiffs' Attempts to Attack Studies and Credibility of Witnesses are Unavailing.

City legislative acts, including the general plan update, are presumed valid. *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1577 n. 14 (11th Cir.1989). The City is not required to justify its actions with specific evidence or documented reports. "Although such planning and study are doubtless desirable, due process does not require a legislative body to perform any particular studies or prepare any particular analysis to justify its decisions." *Smithfield,* 907 F.2d 239, 245. Moreover, as mentioned *supra,* a general hope of undermining the credibility of witnesses is not sufficient to avoid summary judgment. *National Union Fire Ins. Co.*

As a result, plaintiffs' varied attempts to subvert the studies, findings, and testimony of defendant council

members and witnesses are unpersuasive. Plaintiffs specifically allege the following; that Mayor Mark M. Millis, City Engineer Paul Karp, Deputy Public Works Director Lampitoc, Long Range Planner Sandra Bierdzincki, and Planning Director Doreen Liberto-Blanck collectively displayed confusion in their depositions and miscellaneous statements about economic non-viability, the water shortage, the necessity of a specific plan, the ability of the infrastructure of the 55 acres at issue to accommodate increased development, and the validity of the studies underlying the City's actions. However, haphazard attacks on both the competence of various City-members' and the validity of City findings do not seriously challenge the deference due City's actions, which need only have a conceivable rational basis to withstand a substantive due process claim.

D. Whether City Actions Unduly Burdened Plaintiffs

Plaintiffs claim that the City's specific plan requirement, delay in adopting specific plan procedures, water moratorium, and density redesignation collectively diminished the value of plaintiffs' land and resulted in lost sales and/or profits. Specifically, plaintiffs claim that while Webb was originally willing to purchase the tract for $6,000,000 (contingent upon a 5.0 unit/acre zoning redesignation), when he learned that such a density was unlikely, he lowered his offer to $3,735,000. Despite a discrepancy as to whether Webb subsequently retracted his second offer, or whether plaintiffs merely rejected it, plaintiffs have fallen far short of showing undue oppression.

1. *Plaintiffs' Entitlement to a Particular Zoning Density*

To support an undue burden claim, plaintiffs must preliminarily show they have a protected property interest in a particular zoning density. " 'In the context of a zoning dispute, to state a claim under the fourteenth amendment for deprivation of 'property' without due process of law a person must establish that he had a valid 'property interest' in some benefit that was protectible under the fourteenth amendment at the time he was deprived of the benefit.' " *Brady v. Town of Colchester,* 863 F.2d 205, 211-212 (2nd Cir.1988). Plaintiffs, however, fail to make such a showing, citing cases that involve only takings, procedural due process, or plaintiffs who had gone through all necessary channels to create legitimate claims of entitlement (here, plaintiffs never took the necessary step of filing any kind of development application). More importantly, the Ninth Circuit has held that land-owners have no right to the highest, best, and most profitable use of their land. *William C. Huas v. City & Cty. of San Francisco,* 605 F.2d 1117 (9th Cir.1979).

2. *Plaintiffs' Lost Profits, Lost Sales, and Financial Plight*

Despite plaintiffs' claim that City actions resulted in as much as a $6,000,000 loss in land-sale profits the Supreme Court has held that potential profitability is not a strongly protected property interest: "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform.

Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979). The *Andrus* rule applies quite forcefully to the instant plaintiffs, whose failure either to actively market the subject property or to file any kind of development application renders their claim of right to lost profits untenable.

Similarly, plaintiffs' fail in their assertion that the City's water moratorium and delay in developing specific plan procedures made development in 1990-91 impossible, creating a substantive due process violation. "Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership.' " *Agins*, 447 U.S. 255, 262, n. 9, 100 S.Ct. 2138, 2143 n. 9. Here, the City's measures were short and reasonable, especially since they did not affect plaintiffs' ability to begin the development application process.

Finally, plaintiffs' repeated claims of financial plight are irrelevant. Although it may be true that plaintiffs are in a financial bind, such hardship is immaterial to this Court's decision. *Park Ave. Tower Associates v. City of New York*, 746 F.2d 135, 138-40 (2d Cir.1984).

IV. Plaintiffs' Equal Protection Cause of Action

A. Standard of Review

"Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such

as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976). Zoning and land-use issues do not implicate fundamental rights. *Christian Gospel Church v. San Francisco*, 896 F.2d 1221, 1225 (9th Cir.1990). Therefore, absent a showing of invidious race or class-based discrimination, a government action violates equal protection only if it contains a classification "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *New Orleans*, 427 U.S. 297, 303-305, 96 S.Ct. 2513, 2516-2517. To satisfy this low-scrutiny test, plaintiffs must show their property has been treated differently than other similarly situated property, and that there is no rational basis for such differential treatment. *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111 (10th Cir.1991).

B. Whether the City's Actions Evidence Invidious Racial Discrimination

To invoke high scrutiny, plaintiffs must show the following: that the City *intentionally* discriminated on the basis of race and that a racially-neutral decisionmaking process would have led the City to a different result. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-265, 270, 97 S.Ct. 555, 563, 566, 50 L.Ed.2d 450 (1977). Allegations, feelings, and bare assertions are insufficient for this showing. *Celotex Corp.*, 477 U.S. 317, 106 S.Ct. 2548.

1. *Former Council Member Olsen's Alleged Discriminatory Remark*

Plaintiffs' primary claim for intentional racial discrimination is that former council member Olsen allegedly made the following remark to plaintiffs' real estate agent and/or her assistant outside the context of City Council business: "Why should those Japanese people make all that money?" Although defendants deny in numerous declarations that Olsen ever would have made such a statement, plaintiffs argue that her statement somehow indicates a bias that affected the City Council's actions regarding the subject property. Olsen's statement, however, is insufficient for a showing of intentional racial discrimination.

In *FDIC v. Henderson*, 940 F.2d 465 (9th Cir.1991), the former president of a minority-owned bank sued federal bank regulators, whose actions allegedly resulted in his being fired by the bank's board of directors. Although the record there showed sufficient rational reasons for the regulatory action, plaintiff claimed he was a victim of racial discrimination. In support of his claim, plaintiff pointed to several alleged statements by the chief bank regulator (one of which the court considered could evidence a discriminatory intent). Nevertheless, the Court upheld summary judgment for the defense, finding that plaintiff failed to produce ample evidence to create a genuine factual issue as to the chief regulator's intentions. Similarly, in the instant case, which involves only one far more marginal statement, plaintiffs have not made a sufficient showing of discriminatory intent. In fact, it is possible that Olsen's alleged remark could be

construed not as racist but as merely descriptive, albeit insensitive and unsophisticated.

Standing alone, such a statement is also insufficient to show that the City acted with the intent to discriminate. Regardless of whether the statement itself is facially discriminatory, plaintiffs provide no evidence of any controversial statements by other council members. Moreover, the City may only be held liable where plaintiffs' injury stems form official city policy, not merely the alleged, off-duty statements of a single council member. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The City actions and policies cannot be considered racially motivated where there is no evidence of discriminatory intent on the part of four of the five council members. The Ninth Circuit addressed the same issue in *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir.1987), where the plaintiff claimed the decision of the board of supervisors was tainted by the bias of an individual board member. The court found there, as here, that an individual board member has no authority to unilaterally establish official group policy.

Plaintiffs are also unable to show that the City would have come to different decisions in the absence of Olsen's alleged motivations. Plaintiffs present no evidence showing impure motivations on the part of the rest of the City Council, which voted unanimously to act upon Olsen's proposal to change the land at issue to a residential designation. Without any affidavits to the contrary, this Court must presume that the remaining City Council members based their decisions on rational and legitimate concerns.

2. *Potential Unfavorable Treatment of Japanese Americans at City Council General Plan Update Hearings*

Although plaintiffs actually received most of the residential designation they requested, they nevertheless maintain that the City granted other property-owners their full requests. Again, however, while plaintiffs merely make a sweeping assertion, the City supports its response that it answered rezoning requests in a number of ways, all based on the particular circumstances of each case. The minutes of the April, 1990 general plan update hearings show that the City Council received a variety of requests and very often acted in accordance with the recommendations of the Planning Commission. Considering that plaintiffs did receive a residential redesignation, and considering that other (non-Japanese) citizens with similarly large tracts of land were *denied* a conversion from agriculture, plaintiffs' claim that Japanese-American property owners received singularly unfavorable treatment at the hearings is unsubstantiated.

3. *The Racially Discriminatory Content of the Specific Plan Requirement, the Adopted General Plan, the Zoning Redesignation, and the Water Moratorium*

Finally, plaintiffs are unable to prove that any of the City's measures contained a racially discriminatory intent. The specific plan requirement is discriminatory

neither on its face[6] nor in application.[7] The adopted general plan, as well as its provision for the rezoning of plaintiffs' property, also betrays no intent to discriminate. Finally, on its face, the water moratorium, as mentioned *supra*, applied to all citizens and races equally. In application, there is no evidence that the City imposed the moratorium as an attempt to intentionally discriminate against plaintiffs or against Japanese-Americans as a class.

C. Whether the City Exhibited any Differential Treatment of Similarly Situated Property

Because plaintiffs are unable to prove the City had any intent to discriminate on the basis of race, this Court should apply a low-scrutiny test, the first prong of which is to decide whether the City treated similarly situated property differently. Plaintiffs point to none, claiming only, for instance, that the City granted the rezoning request of a large apartment complex on a town hillside. It is fatal to plaintiffs' assertion that they can cite no large tracts of agricultural land, with similar resources and capacities for development, which received significantly better treatment. The only tract of land plaintiffs identify

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[6] There is no reference to race either in Cal. Govt.Code §§ 65450-65457 or in the specific plan provisions of the general plan.

[7] In its exhibits, the City shows that it not only imposed a specific plan requirement on the three other property-owners in the 55 acre tract, but also imposed either a specific plan or planned development (similar to a specific plan) on at least six other properties in the town.

as similarly situated is the remaining 20 acres on the 55 acre plot, which also received a specific plan requirement in order to coordinate the development and infrastructure of the entire region. Therefore, plaintiffs fail to satisfy the first prong of the low-scrutiny test.

D. Whether there is a Rational Basis for any Differential Treatment of Similarly Situated Property

It is unnecessary to analyze this second prong of the test since plaintiffs' preliminary showing was inadequate. However, even if plaintiffs had proven there were properties similarly situated which received differential treatment, it is clear the City's objectives in any such treatment would have been rational. Zola's declaration indicates that the City based plaintiffs' rezoning decision on a "need to plan roads, coordinate sewage disposal, roadways, easements, drainage, utility services and to distribute available water supplies and sewage capacity." In addition, the density decision manifestly serves the general plan's twin goals of preserving agriculture and accommodating limited development.

V. Whether the Individual Council Members are Immune from Liability

Whether the individual council members are immune to suit depends on whether their actions in this case are considered legislative or adjudicative in nature. *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir.1990). According to *Kuzinich v. County of Santa*, 689 F.2d 1345, 1349-1350 (9th Cir.1982), members of local legislative bodies have

complete immunity from suits based on their legislative acts and qualified immunity from suits based on their executive acts.

It is well-settled that general plan, specific plan, and rezoning enactments and amendments are legislative acts in that they affect populations, not just small groups on individual grounds. *Harris; Kuzinich; City of Eastlake v. Forrest City Enterprises*, 426 U.S. 668, 673-674, 96 S.Ct. 2358, 2362-2363, 49 L.Ed.2d 132 (1976); *Yost v. Thomas*, 36 Cal.3d 561, 570, 205 Cal.Rptr. 801, 685 P.2d 1152 (1984). Therefore, under this case law, the City Council actions at issue appear to fall squarely within the category of legislative action. Plaintiffs attempt to analogize *Harris*, where the County responded to the request of a private landowner and, without notice, rezoned plaintiff's land in a General Plan Amendment. In that case, the court found that the County's decision specifically to rezone plaintiff's land was an act distinct from the general plan amendment and violated plaintiff's right to procedural due process. Plaintiffs claim that in the instant case the the City Council similarly targeted numerous parcels of land for rezoning in its general plan update process. That the City rezoned and applied specific plans to numerous parcels of land, all with proper notice, only supports the legislative nature of the City's actions. The rezoning of plaintiffs' and many other tracts of land was merely a part of an overall general plan amendment that affected the entire Arroyo Grande community. Similarly, although plaintiffs perceive the water moratorium as a measure somehow directed specifically toward impeding the development of their land, it, too, was a measure designed to affect and benefit the City at large.

Therefore, because their actions were legislative in nature, the individual council members are immune from liability.

VI. Conclusion

Although plaintiffs have failed to support their motion for summary judgment, defendants have shown that no genuine issues of material fact remain with respect to their motion and that they are entitled to judgment as a matter of law. The following significant facts, for instance, are undisputed: that plaintiffs appeared at and impliedly had notice of the general plan update hearings;[8] that they applied for and received a residential designation of their property; that they never formally applied for a specific plan or subdivision map; that neither the general plan, nor its specific plan requirement, classify land on the basis of race; that the City assigned a specific plan (or similar planning tool) to other property owners, including the owners of the remaining 20 acres of the subject property; that Olsen's alleged statement was made privately and off-duty; and, that there is no evidence of any similar statements or motivations by any other City Council members. In addition, if

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[8] The Court finds plaintiffs had notice of the City Council hearings for at least two reasons: (a) Burtram Johnson attended at least one of the meetings, and (b) Johnson declares that he "personally insured that the April 4, 1990 materials [stating his reasons in support of the redesignation of plaintiffs' land] were hand-delivered to each councilmember prior to their hearings in late April and in May of 1990."

plaintiffs' action is even ripe, it fails to state either an equal protection or substantive due process claim.

Plaintiffs cite inapposite rezoning/development cases involving the denial of summary judgment motions against landowner plaintiffs. Both *Bello v. Walker*, 840 F.2d 1124 (3d Cir.1988), and *Del Monte Dunes* are cases in which the court denied a City's summary judgment motions against the plaintiffs where the City had rejected plaintiffs' development applications and where plaintiffs provided sufficient affidavits showing a trier of fact could reasonably find that such denial was arbitrary and irrational. In *Bello*, plaintiff showed City Council members who denied development permit were strongly opposed to the project and had personal animosity against one or more of plaintiff's employees. In *Del Monte Dunes*, after plaintiff had completed all requirements for a development permit, the City granted, and then abruptly denied, permission, citing vague reasons for so doing. There was also evidence that comparable property received more favorable treatment.

In the instant case, the City essentially granted plaintiffs' rezoning request, requiring only that plaintiffs' also submit a specific plan for the subject area. By failing to take any such action, plaintiffs created for themselves the only true impediment to property development. In addition, the only evidence of improper motive on the part of the City is one disputed, off-duty statement by one council member. Plaintiffs have presented no affidavits regarding the motivations of the rest of the City Council.

The Court, accordingly, GRANTS defendants' motion for summary judgment and DENIES plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KINGO KAWAOKA; TATSUMI KAWAOKA, Plaintiffs-Appellants, v. THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A.K. DOUGALL; DORIS OLSEN, Defendants-Appellees.	) No. 92-55714) D.C. No. CV-90-4465-KN) ORDER) (Filed Apr. 18, 1994)

Before: FLETCHER, PREGERSON and HALL, Circuit Judges

Appellants' motion to file supplemental excerpts of record for petition for rehearing and rehearing en banc is denied.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court had requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

KINGO KAWAOKA and TATSUMI KAWAOKA, Plaintiffs, vs. THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A.K. DOUGALL; and DORIS OLSEN, Defendants.	CASE NO. 90-4465 KN (Ex) DECLARATIONS OF CRAIG KAWAOKA AND BURTRAM JOHNSON IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: January 13, 1992 Time: 9:30 A.M. Court: 3 Trial Date: April 7, 1992

DECLARATION OF
CRAIG KAWAOKA

I, Craig Kawaoka, declare as follows:

1. I am the son of the named plaintiffs herein, Kingo Kawaoka and Tatsumi Kawaoka. My father passed away while this action has been pending, and my mother is not knowledgeable on the facts of this matter, she is 76 years old and has been ill for some time. I make the statements

herein on their behalf from personal knowlege [sic] of the facts. I have a Bachelors of Science from Cal Poly San Luis Obispo, in Food Sciences. I have worked on the strawberry farm all my life, up until the past year. I am 32 years old, competent to testify to these matters, and would do so if called as a witness at trial.

2. I have reviewed all of the papers filed by defendants in connection with this matter for summary judgment. Most of the factual issues which are in dispute are set forth in the verified complaint, in my deposition testimony, and in the testimony of others, which I understand are being filed and need not be reiterated here. I will address here some of the things that were not asked in my deposition or have transpired since then, or have been raised in the "Declaration of Lloyd Zola" filed by the City with its motion.

3. Defendants' papers state in various places that the area which the city included in a requirement for a "Specific Plan" comprises 55 acres, and is currently (still) cultivated in strawberries. These statements are not correct. The subject properties are under four different ownerships, and our property comprises almost *all* of the area designated on the City's Map for a "Specific Plan". The farm is surrouded [sic] by smaller ownership parcels of approximately 4-5 acres (Toma) 4-5 acres (Matsumota) and 2 acres (Young), for a total of approximately 48 acres which is actually in the "Specific Plan" boundary. I can verify that the total acreage is *not* currently being farmed for strawberries; it is not viable to continue strawberry-farming without the necessary pest-control sprays that can no longer be obtained. Out of the 48 acres referred to

above, under actual cultivation at this time for strawberries are approximately 10 acres maximum, none of which is our acreage. Young farmed strawberries only for 3 years, from 1985-1988. There was only sporadic farming *prior* to 1985, in the years that I've lived here, and no farming *since* 1988.

4. Our farm used to provide an adequate living for my parents, myself, my brother Mike and his son Scott, and approximately 50 to 60 employees. The inability to continue farming has been demonstrated over the past 6 years and the information on the losses incurred by my family is included in the packet of materials that was submitted to the City through Burt Johnson in April and May 1990 (Plaintiffs' Exhibits 11-14, 38). The losses are now worse than they were then.

5. After the City's action in May, 1990, we were unable to continue paying the necessary overhead to keep the farm going and pay the employees. We have been borrowing money to do so and continually refinancing the loans for several years, but our financial advisor strongly advised that we were unable to continue in that mode because we weren't even able to service the debt properly. (See Plaintiffs' Exhibit 13). Our friends, attempting to keep us afloat sought out and found a larger enterprise who was willing to lease the farm for its early-season berries, but who could absorb and offset the anticipated losses against other parts of their operation because at least it provided them with product for a particular market they wanted to serve. We leased the land (about 28 acres net farmable) at $550 per acre per annum and my brother, my nephew, and myself signed on for base monthly salaries of $2,000, $1,700 and $1,600 and an

arrangement to share in any profits. The year's lease ended in September and we received no "profit-sharing" because there was in fact a loss in excess of $70,000. The lessee is no longer farming the lands for strawberries. My brother, Mike, is now drawing unemployment, I am working part-time at another job, while my nephew is also having difficulty finding work. We are leasing the land to a friend at $600 per acre for 22-24 acres of useable land, for a total of $13,800 per year, which is not enough to begin covering our debts and living expenses. The lessee will attempt to grow "row crops" (cabbage), but no one knows if he will succeed. The soil is sandy "non-prime" soil ("Oceano sand"), and it is not appropriate for agriculture preserve. The neighbors are residential dwellers who object to the pest-controls that have to be utilized.

6. The City's motion papers say they "granted our request" for residential zoning. This is a distortion of reality. We have no useable residential zoning on the property, we have only a condition which still requires us to "prove" farming is not viable, although I don't know what else we can do that we haven't already done, and once we do that we must group the other three property owners with us into an application for a "specific plan" and if the city approves that application, we end up with zoning that no one wants to buy because it makes no economic sense. The deposition testimony of our real estate agent on this point remains true – no one will make an offer on this property because the designated zoning and specific plan make it economically absurd. No one will develop rural "estate lots" next to the low-priced

apartments, condos and high-density housing surrounding our property. We have sought buyers through several brokers and no one is interested. There is no point in "advertising" a property of this size as Defendants suggest or imply, in their papers. It's not like a single-family lot or a used car. There are a limited number of potential buyers knowledgable [sic] about the area, and none of them are remotely interested in developing the property with the conditions placed upon it by the City.

7. Our family has no personal, social, or business relationship with the three adjacent properties (Tomas, Matsumoto, and Young). We have no ability to get them to agree upon a "specific plan" for the acreage, nor do we know of any logical reason why they would be interested in consenting to such an expensive and unpredictable process. Each of them has frontage on a major thoroughfare and they have no need for anything that a "specific plan" would give them. We also have no need for any assistance from them, nor any easements or access through their properties, hence it is irrational to force us into a specific plan which no one wants, needs, or can even understand a rationale for requiring. Our consultant, Burt Johnson, approached the Matsumotos to see what their reaction would be and they were not interested in getting involved in anything to do with a specific plan since they have what they need (commercial designation for their property) to continue using their roadside stand to sell berries at retail prices. We cannot do that because we don't have property along the commercial boulevard. On the Toma property south of us, my brother Mike is trying to farm the 4 acres simply because he has nothing else to do to make a living. This is not a

viable living, it is a desperate attempt simply to survive while we try to remedy the city's arbitrary "regulation" of our land and make it saleable so we can buy farmland elsewhere, away from residential housing, and do what we know how to do for a living – grow strawberries.

8. I have read all of the declarations attesting to the honesty and integrity of Doris Olsen and how she couldn't possibly have said anything derogatory about "those Japanese farmers". I dispute this because when our lawsuit was reported in the local newspapers, Olsen was quoted in the article as saying she "knew the Kawaoka family very well." (See Exhibit A hereto, article dated April 19, 1991). This is completely untrue. No one in our family has ever met or had a personal conversation *of any kind* with Doris Olsen. For her to say that she knew our family very well is an outrage. She has never exhibited any friendship to us, and her action on the City Council making the motion to hold us in agriculture while we "prove" economic non-viability, and requiring a "specific plan" and irrational zoning which killed the sale of the property, all the time knowing the extreme hardship we were going through with the farm losses, hardly indicates "friendship" of any kind.

9. It is painfully obvious to me that the local politicians cater to a constituency who want to "preserve" agriculture because they think it is "quaint", rural, and prevents the urban woes they came here to escape, yet they have no knowledge of what it takes to run a farm or the problems they've created by surrounding us with their homes. It is clear to me other farmers, as evidenced by the typical newspaper article dated May 1, 1991, attached as Exhibit B, that the periodic "support" programs or

"help the farmer" ideas are bureaucratic boondoggles meant to do nothing but fulfill a non-farmer's idea of what should be done to keep the farms in existence. In our case, however, the City Council has gone overboard in their method of "helping" preserve our farm by refusing to allow us to get out from under our staggering debts. In response to the City's request for documents, I have been required to supply and divulge all of the most sensitive and private aspects of our financial plight, including all of our loan applications and status documents for the past five years (submitted separately as Plaintiffs' Exhibits 11-14; 38; 63 through 94), yet nowhere in the moving papers filed by the city in this motion do I see any discussion or recognition of this information. Our financial data was required to be divulged to the City prior to the Council decision (see Plaintiffs' Exhibit 38) despite my parents' traditional attitude of protection of embarrassing private matters such as this, and yet when we did so and proved with past historical records that farming was *not* viable and we were being driven to insolvency, the city failed to act upon the information. They went ahead and adopted the general plan policy which *still* requires us to "prove" what we have *already proven*! I believe this is irrational, arbitrary, unreasonable and vexatious, and I wish to have it presented to a jury of my peers for consideration. I believe that no one who hears all the evidence and comprehends the full impact of what has been done (and is still being done), in the guise of "planning", will fail to see that it is unfair and irrational. The city politicians and planners have put us *out of business* by allowing residential zoning to surround us, and now they prevented the sale of the property for

residential uses, all in the name of "preserving agriculture". This is not rational; it is not preservation, it is restriction without reason. To my way of thinking, it is irrational to "preserve" that which is unacceptable to the area residents, from a health and safety standpoint, merely so the city can say it has a rural atmosphere.

10. The City Council "findings" for our property state there is "inadequate" water to allow development at feasible densities. The City's ex Public Works Director, Paul Karp, testified in his deposition that he *doesn't know* how much *more* water it takes to farm strawberries than to put the acreage to residential uses and that the question should be asked of *us*, the farmers (See Deposition of Paul Karp at p. 53 lines 5-20). I know from review of a study of the meter readings on our water consumption records (175 homes) that we consume an average of 131 acre-feet on an annualized basis on the farm. (See Plaintiffs' Exhibit No. 100). The same acreage, if put to residential uses as the density proposed by our buyer (Lee Webb) at 5 houses per acre (175 homes), would consume only 95.5 *acre-feet* on an annualized basis, using the figures set forth in the City's EIR (Deft's Exhibits p. 167). Hence, it is obvious to me (and not disputed with factual evidence by anyone in the city), that the conversion of our property to residential uses would *save* more than 36 acre-feet of water per year. The city never acknowledges this anywhere, claiming that the "farm water" must be saved for the "farmers" while there is a shortage (or will be a shortage) for residential build-out. I say this is nonsense, a pretext to hold the farmland as open space and enjoy its "scenic beauty". It is irrational to claim there is insufficient water while at the same time forcing us to continue

using *more* water than would be used for housing while we go insolvent in the process. To me it is nonsense, and it is unfair to my family and others in a similar predicament. We have two wells on our property which can pump more than 450 gallons per hour of water. (See Plaintiffs' Exhibits 61, 100). County health officers have tested the water (See Plaintiffs' Exhibit 99) and have assured us it can easily be made potable for residential purposes. (See Craig Kawaoka Deposition pp. 96-97). I have been provided with no evidence of any kind to support the City Council's "finding" that our property lacks adequate infrastructure such as water, sewer, roads, drains, and air quality (See Plaintiffs' Exhibit 52, and compare Defendants responses to Plaintiffs' interrogatory Number 23-28 and Defendants' Responses to requests for documents, filed herewith as Plaintiffs' Exhibits 107, 108, 109, 110). These "findings" are completely arbitrary; in my opinion they are a mere pretext for the result desired by the city, *i.e.*, to preclude residential development, kill the then-pending sale to Lee Webb, and preserve the "rural atmosphere" of the area.

11. The City's papers imply or state that we could have immediately filed an application for a "specific plan" after the City Council's action of May 22, 1990, We directed Burt Johnson to look into this and his letter of July 5, 1990 reflects the response given to us by the city – it was not possible to do so. In addition to subsequent periodic calls by Mr. Johnson to the same effect, I personally called the Planning Department and was told the same thing in April, 1991. (See Deposition of Craig Kawaoka at pp. 50-51; See Plaintiffs' Exhibit 34). I am outraged at the City's false claim and pretense to this

court that a specific plan filing could have or should have been made and I wish to present this evidence to a jury. It is arbitrary, irrational and vexatious for the city to say "you cannot file something", and later turn around in court and say "you should have filed something".

12. I have read the "Declaration of Lloyd B. Zola" where he states that he has found in "other communities" that "agriculture preservation" is related to a desire to slow or stop urban development, but that in Arroyo Grande he "found this generalization to be untrue", and that he "found that local citizens wanted to see agriculture operations continue". He does not state where he "found" this, or who he talked to. I will testify at trial that the "local citizens" around me have made it impossible to continue farming, and I will back that up with documentary evidence in the form of our business records from pesticide-control companies (See Plaintiffs' Exhibits 7, 8, 9, 10) and financial records (Exhibits 11-14, 63-97). I would like the jury to determine whether Mr. Zola's "finding" has any evidence to support it, or whether my (contrary) "finding" is correct.

13. Lloyd Zola also states that he recommended the residential densities of 4.5 dwelling units/acre on half the property and one dwelling unit/acre on the other half "because of the limitations which the City faced regarding long-term water availability . . . I believe that this density is compatible with surrounding land use densities". (*Id.*, p. 10 para. 28-29). He further states that his recommendation for the mix was based upon "averaging out" the intensity of use within the fifty-five (55) acre strawberry fields; " . . . In this manner, the overall intensity, projected water consumption, and projected traffic

generation of the fifty-five (55) acres would be equivalent to that of the surrounding lands". (*Id.* para. 31). The purported statements of fact makes no sense. If Mr. Zola ever made any such calculations or recommendations, he never divulged them to us prior to the hearings on this proposal, nor at any time since. The densities are *not* "compatible with surrounding land use densities", which are apartments, condominiums, and high-density housing (See Plaintiffs' Exhibit 38 and map attachments thereto). The City's certified EIR for the General Plan concluded that densities *higher* than those placed upon our property were *not* infeasible. (See Exhibit D hereto). To our knowledge, there was never presented for review and comment, and the City Council never reviewed, *any data* regarding "projected water consumption" for this acreage under any proposed densities, nor was any comparison made with farm water use. (See Deposition of Paul Karp at pp. 53-54). No information was presented at any hearing regarding the "projected traffic generation of the fifty-five (55) acres", nor was any evidence presented that it "would be equivalent to that of surrounding lands". These contentions are simply not true. The surrounding lands are developed at a *much higher* density; the water use would be adequately met at a density of 5 du/acre, and the project traffic could be accomodated [sic] as with the "surrounding properties". The subsequent statement by Mr. Zola (p. 11 para. 33 (b)) that the density recommended by him "supports" the General Plan policy "2.3" is absolutely false, because this recommendation did not "broaden the range of, and encourage innovation in, available housing types . . . , in fact it thwarted such

policies by killing the proposed sale to Mr. Webb for residential housing.

14. Mr. Zola states further (*id.* para. 34) that he concluded (from reports) that the City "did not have enough water available to accomodate [sic] maximum buildout under the then existing General Plan", hence he recommended lowering the densities to a projected buildout of approximately 19,500 population. (*Id.* p. 12 para. 38). What Mr. Zola *fails to point out* is that the EIR which he and his firm prepared concludes that the existing water resources *can support* an increase in the population from its present 14,057 to a population of 16,800, "including build-out of all non-residential uses". (See Exhibit C hereto, Final EIR, p. 17). Thus, our property could easily build-out to the density we requested without impairing anything. Further, the EIR concludes that even at *maximum* build-out of 19,500, the impacts on infrastructure can be mitigated to an acceptable level. See Exhibit D hereto, p. 4. It is inconsistent to claim that the EIR (which Zola asserts was correctly prepared under state law) recommending densities at 5 du/acre is now somehow incorrect, and that 4.5 du/acre is the *maximum* that could be accomodated [sic] by the water supply. The EIR also fails to add into the equation the amount of water available when agricultural lands are no longer used for agriculture, hence, it is an understatement of the projected supply, used as a pretext for limiting growth.

15. The net impact of the city's arbitrary action is that we are out of business, deeply in debt, unemployed or part-time employed with no skills other than farming, yet we cannot sell the land, can't do anything with it, and are tied to it like a sinking ship. I and my family know

without any doubt or equivocation that the city's decision and continuing control over our land, our very livlihood [sic], is burdensome, oppressive, and unreasonable.

I declare under penalty of perjury that the foregoing statements are true and correct. Executed this 13th day of December, 1991 at Santa Monica, California.

/s/ Craig Kawaoka
Craig Kawaoka

[Exhibits Omitted In Printing]

DECLARATION OF BURTRAM JOHNSON

I, Burtram Johnson, declare as follows:

1. Over the past 15 years as a land-use consultant I have been involved in a minimum of 15 parcel and tract map application evaluations, analysis or submittals.

2. Arroyo Grande, the City Council findings (Plaintiffs' Exhibit 52) state that there is an alleged inadequacy of "infrastructure", such as roads, sewage, water, and air quality.

3. In the normal subdivision process these issues are addressed upon the filing of a tract map when the city prepares an "initial study", as required by state law, simply to identify environmental impacts which may arise. If potential impacts are identified, an EIR or Mitigated Negative Declaration is then prepared to analyze, disclose, and mitigate the impacts. The process of drafting an EIR, holding hearings on it, and reaching conclusions as to those impacts can take anywhere from 6 months to a year.

4. After the EIR is analyzed and after all public comment has been received, the governmental entity then normally makes findings as to the impacts, alternatives and mitigation measures before deciding what to do (approve, disapprove, modify, etc.) with a project.

5. Without going through this process, the City Council of Arroyo Grande arbitrarily adopted, by fiat, their "findings" on the Kawaoka property regarding the purported lack of infrastructure for development.

6. Prior to the May 22, 1990 City Council action, I met with Paul Karp, then Director of Public Works. We discussed infrastructure – water, sewer, roads, and drainage. I specifically inquired about the existence of facilities to develop the property owned by the Kawaokas as part of a routine residential tract map development. I was questioning the (proposed) requirement for a "specific plan", because it made no sense. In that conversation, the specific plan requirement made no sense to Paul Karp, either. The subject for our discussion was a tentative lay-out of the property shown on an engineering map with roads and subdivision of the acreage into blocks for future lots. Paul Karp was aware that all ingress and egress would be solely from the Kawaoka property and their easement as shown on the drawing, with no need for access through any other property. Mr. Karp specifically requested that the 50 foot recorded ingress/egress easement owned by the Kawaokas from the north (at Grand Avenue and Courtland Street) would be utilized as one ingress/egress for the proposed subdivision, constituting an extension of existing Courtland Street across Grand Avenue to the property. There were specific discussions on more than one occasion with Mr. Karp in his office concerning the ability of the city to accept and accomodate [sic] sewerage and traffic from this development. Mr. Karp told me that the city *could* accommodate the development at a density of 6,000 square-foot lots (approximately 6 dwelling units per acre, approximately 210 houses). (Lee Webb, the purchaser had indicated that a minimum of 5 units per acre was needed to make the development viable for low-moderate priced housing units targeted for the Arroyo Grande working-force buyer market).

7. Paul Karp also stated to me that there were adequate water resources available for the development of the Kawaoka property (at the density of 6,000 square foot lots) at the time of our discussions, *prior* to the Council hearing in May 1990.

8. I had heard that water was a big issue in Arroyo Grande, so I specifically inquired on this point. Paul Karp handed me documents (attached hereto as Exhibits A,B) which supported his remarks to me that there were 350 acre-feet of water then available on a "first-come, first-serve" basis to any applicant. He further indicated that development of the Kawaoka property would *not* cause a problem for the water supply of the City of Arroyo Grande. There was no uncertainty or equivocation on this point. I said to Karp, "your indications are that a tract map is adequate and there is no need for a specific plan for this area"? He agreed to that. I said, "will you state that to the City Council"? Karp stated, "The City Council will not ask me", but he said, "If you look at these documents I've supplied you, it will show you there is today available 350 acre-feet of water and you can use this information at the Council hearing". I did use this information from the City's own Public Works Director, and the City Council arbitrarily ignored it and adopted their "finding" with no basis in reality. It was then apparent to me that the reason Karp said "they won't ask me" is that the Council did not want to hear this information. It is quite clear to me that the Council, which adopted a "moratorium" ordinance that same night, was using water as a pretext for controlling land use, when the evidence did not support their position. Paul Karp told me quite frankly that the "water issue" was being used to

curtail development in Arroyo Grande, and I witnessed it with the Kawaoka proposal. The combination of the "findings", the "specific plan" condition, the moratorium, and the generally perceived arbitrary attitude of the City Council has made it impossible to develop or sell the Kawaoka property.

9. The Council's findings can be demonstrated to be false by reference to the city's own records which will be presented at trial. Aside from the oral communications (described in my deposition) wherein I was advised by the deputy city engineer, Avelino Lampitoc, and Director of Public Works Karp that these infrastructure issues *could* be handled with a standard tract map, I obtained copies of city atlases which provide evidence on these issues.

10. The City's sewer atlas shows a lift station at Poplar Street and shows sewer lines running north-south on Spruce, and east-west on Cedar, terminating just short of the Kawaokas property with a manhole, and going south from Spruce to Ash Street with a manhole at the intersection of Spruce and Ash and another one directly south of the Kawaoka Property on Ash. (See Exhibit C hereto). Thus, there is existing infrastructure to service the property. However, even beyond what now exists, there is a 15 foot recorded drainage easement along the eastern boundary of the Kawaoka property which is wide enough to accomodate [sic] a sewage line without need to utilize the City's existing pipes. This would be a normal part of the tract map process, once under way. The city's "findings" are not only premature and unreasonable, in my opinion, they are demonstrably false. Further, the Kawaokas have also paid sewer capacity allotment fees to

the City of Grover City for the past 10-15 years because a portion of the western boundary of their property is within the boundary line of the City of Grover City. (See Plaintiffs' Exhibits 113, 114 evidencing typical monthly statement and payment). Sewer and water services are therefore available on a "will-serve" basis from Grover City, and a gravity flow system is certainly feasible along the southwest boundary of the property. (I have investigated this with the officials at Grover City Building & Safety and Planning Director, and hook-ups are available for sewerage).

11. I also investigated the capacity of the sewage treatment plant to determine the alleged inadequacy of this infrastructure. The South San Luis Obispo County Sanitation District treats the sewage from Arroyo Grande and Oceano, and also contracts with Grover City. Certified records obtained by plaintiffs' attorney (See Exhibits 115-117)[1] reveal that in May, 1990, at the time of the City Council's purported finding regarding "inadequate" sewer infrastructure, the Sanitation District has nowhere near capacity utilization and could easily accomodate [sic] a residential tract development on the Kawaoka property. Plaintiffs' Exhibit No. 116 shows that in May 1990, the Sanitation District used only 82.7% of their 2.3 million gallons per day flow capacity. This means that a capacity of 396,980 gallons per day was available for new hook-ups. A suburban subdivision of 175 homes on the Kawaoka property would generate less than 70,000 gallons per day. Now, more than 1 1/2 years later, the Sanitation District records still reflect excess capacity. Plaintiffs'

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[1] Copies are attached hereto as Exhibits D, E, F.

Exhibit 117 shows that the Sanitation District used on 77.8% of their allotted capacity in October 1991. These figures indicate very clearly to me that the city's "findings" were not only arbitrary and capricious but fraudulent, because the City Council has full access to these figures at all times, with a representative on the Board of the Sanitation District.

12. The City Council "finding" regarding inadequate drainage "infrastructure" can also be shown to be arbitrary, capricious, and false. The drainage north of Grand Avenue is presently collected in existing pond facilities north of the Kawaoka property, as indicated on pages 39-38 and 38-38 of the City's drain atlas (Exhibit G). There is an existing 15-foot wide recorded drainage easement from the Kawaokas to the City of Arroyo Grande along the eastern boundary of the property. (See Plaintiffs' Exhibits 111, 112). There is an installed 8-inch drainage pipe, with a pumping facility, to carry the ponded waters south to Ash Avenue. I have reviewed the deposition testimony of Paul Karp herein, I find that he was either ignorant or deliberately misleading in his testimony about the drainage facility in this area, which was recorded a few years ago. I find his testimony incredible, especially when I review the other testimony about his alleged lack of recall of the specifics of our conversations, wherein he gave me different information.

I declare under penalty of perjury that the foregoing statements are true and correct. Executed this 13 day of December, 1991, at Santa Monica, California.

/s/ Burtram Johnson
Burtram Johnson

[Exhibits Omitted In Printing]

No. 94-99

Supreme Court, U.S.
FILED
AUG 16 1994
OF THE CLERK

In the Supreme Court of the United States

October Term 1994

KINGO KAWAOKA and TATSUMI KAWAOKA,,

Petitioners,

vs.

THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A. K. DOUGALL; and DORIS OLSEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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51pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the City of Arroyo Grande's ("City") general plan, which allows petitioners ("landowners") to develop approximately 83 single-family residences on their 35-acre strawberry farm, provided they apply for a specific plan under California law and development approvals, work a taking of the land?

2. Did the lower courts err in rejecting the substantive due process claim by:

a. Finding the alleged impact of the general plan insufficient to violate due process standards;

b. Finding no legally cognizable evidence of improper motivation or discriminatory purpose;

c. Finding that the "as applied" substantive due process claims were not ripe for judicial review?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The Court lacks subject matter jurisdiction over the "taking" claim. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194-196, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). This claim was never raised in the proceedings below. Federal courts have no jurisdiction over a taking claim because the landowners never sought "just compensation" through available state

procedures. The claim is therefore not ripe for federal court review. *Williamson County*, 473 U.S. 172, 194-196.

The courts below correctly held that the "as applied" substantive due process claims are premature because the landowner never applied for any development approvals available under the state and local procedures. 17 F.3d at 1232-1233; 796 F.Supp at 1235. The lack of a "final decision" regarding the application of the general plan to the property precludes federal review. *Williamson County*, 473 U.S. 172, 199-200; *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987), *cert. den.* 494 U.S. 1043; *Landmark Land Company v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989).

Landowners have abandoned their equal protection claim. The only claim over which the Court has jurisdiction is the claim that the City's general plan on its face violates substantive due process. 17 F.3d at 1233-1238.

STATEMENT OF THE FACTS AND THE CASE

Despite the recitation of "facts" (many of them not appearing anywhere in the record) presented by landowners, this is not a case about reparations for injustices done Japanese-American citizens during World War II. This is a case about land use planning, and not a particularly unusual one at that. An objective account of relevant facts is stated below. Specific rebuttal to factual misstatements and distortions by landowners is made in part B of the statement of facts.

A. The Legally Relevant Facts - The Challenged General Plan.

The subject property, 35 acres of land within the boundaries of the City of Arroyo Grande is owned by a family trust. Kingo Kawaoka (now deceased) farmed the land, primarily growing strawberries, since first purchasing it in 1954. The land is now leased to a tenant who continues to grow strawberries on it. Landowners also lived and raised their family in a home on the property. Their business affairs are now managed primarily by Craig Kawaoka, the family's senior son.

In the late 1980's landowners experienced losses on their farming operations. They blamed the encroachment of urban development surrounding their property, which they said restricted their ability to use pesticides and fungicides they believed necessary for the relatively chemical-intensive business of strawberry production. The record does not disclose whether other factors, such as fluctuations in the notoriously fickle strawberry market, poor management decisions or the historic California drought occurring during this period may have been the true cause of their losses. Notwithstanding the alleged problems, the property was fumigated to prepare for strawberry planting at least once after this lawsuit was filed, and agricultural activities continue. Petitioner's appendix, pp. 66-67.

Feeling that farming was no longer profitable, and with Kingo Kawaoka approaching his 80's, the family decided to attempt to sell the land for development. They found a potential buyer who agreed to pay $6,000,000 if the land were rezoned for relatively high density (5 units per acre) single-family residential development. The land

was zoned at the time for commercial or light industrial uses (a classification which also permitted agriculture).

Landowners engaged a consultant to assist them in obtaining a rezoning. The consultant, Bertram Johnson, quickly discovered that he could not, in his own words, "make a deal" with City officials as was his apparent expectation, for the necessary rezoning and subdivision approvals through informal back-room negotiations. Formal development applications were required. Johnson and landowners, however, also discovered that the City was in the process of updating its city-wide general plan. Their efforts then turned towards influencing the general plan process to achieve their goals.

The lengthy process of updating the City's general plan began in 1988 and proceeded through environmental review and innumerable public workshops and hearings for over almost three years. The draft general plan presented to the City Council in 1990 stated these basic objectives for the City:

"It is the fundamental goal of the City of Arroyo Grande to achieve a community which:

* Promotes a rural, small town atmosphere and retains Arroyo Grande's traditional ties to agriculture.
* Recognizes limitations upon the natural resources necessary to support urban and rural development, and lives within those limits.
* Accommodates a balance and variety of urban and rural lifestyles,

> providing the best possible quality of life for all residents."

Consistent with these overriding objectives, the draft general plan proposed to designate landowners' property and three adjoining parcels, which together constitute 55 acres of active farming within the City, for continued agricultural use. The general plan also recognized, however, that agricultural uses might not remain viable on these properties in the long term. Policy 1.5 of the draft general plan therefore specifically provided that, upon it being demonstrated that agriculture is no longer economically viable, the properties could be converted to residential and commercial uses. 17 F.3d at 1229-1230. Policy 1.5 also required that, prior to conversion, a specific plan to guide development of all four properties be prepared pursuant to California Government Code Sections 65450-65457. *Id.* at 1230.

At several of the numerous public hearings held on the proposed general plan before the City Planning Commission and City Council, Craig Kawaoka and Bertram Johnson appeared and objected to the agricultural designation of landowners' property. Johnson demanded that the property instead be immediately designated for single-family residential development. As evidence that farming was no longer viable, Johnson presented records of landowners' several recent bad economic years and letters from several sources regarding problems with continued use of agricultural chemicals on the site. While the evidence was less than compelling, the City Council agreed to immediately designate the entire 55 acres for residential and commercial development. Consistent with Policy 1.5, "single family residential" development of up

to 4.5 units per acre was permitted on the southern portion of the property. "Rural residential" development of 1.0 units per acre was permitted on the northern half. 17 F.3d at 1230. The adjoining parcels were given similar land use designations. The basis for these designations is fully explained in the declaration of Lloyd Zola, the City's general plan consultant, filed in the proceedings below and attached as an appendix to this brief. These land use designations together permitted development of approximately 83 units on landowners' 35 acres. Over Johnson's objections, the specific plan requirement was retained by the City Council for all four parcels.

Partial success did not satisfy landowners. Their potential buyer reduced his offer from $6,000,000 to $3,735,000 and then withdrew it altogether. 17 F.3d at 1231. Landowners filed this suit in August 1990 claiming that the specific plan requirement denied them due process and equal protection, and that the City's actions were racially motivated. Landowners also complained of an emergency "water moratorium" ordinance enacted by the City Council at the same time as the general plan amendment. The ordinance temporarily (initially for 45 days and then for a full year) suspended processing of new subdivision applications while the City studied its growing water supply problem. During the litigation (without, however, amending the complaint) landowners added objections to the "rural residential" density restrictions imposed on part of their property. 17 F.3d at 1236; 796 F.Supp. at 1397. Neither landowners' original nor amended complaint alleged any "taking" of property in violation of the Fifth Amendment's "just compensation clause". Landowners' counsel below apparently recog-

nized that such claims were barred by *Williamson County*, 473 U.S. 172, 194-196.

After extensive discovery, the case proceeded to summary judgment. The City submitted portions of the administrative record and lengthy declarations from its planning consultant, Lloyd Zola, and various City representatives setting out the basis for its planning policies and decisions. Landowners submitted opposing evidence massive in bulk, but largely devoid of content.

As the sole substantive evidence of racial discrimination, landowners presented declarations asserting that former City Council member, Doris Olsen (now deceased), had made a racially tinged statement ("Why should these Japanese people make all that money?") in two private conversations to landowners' real estate agents near the time of the general plan hearings. One of the declarants testified in deposition that the statement was surprising and entirely out of character for Ms. Olsen. The district court found Olsen's alleged statements "unsophisticated and insensitive, but also ambiguous at best as evidence of racial animus. 796 F.Supp at 1330. The Court of Appeals considered the statements "deplorable," but also clearly insufficient, standing alone, to support a claim of racism on the part of the entire City Council. 17 F.3d at 1239. All of landowners' witnesses (including Craig Kawaoka) were unanimous that they personally had never heard or seen any evidence of racial animus by any City official. Landowners' only other "evidence" of racial animus consists of a report by Craig Kawaoka of an alleged conversation in which another Japanese American landowner speculated that racism might have been the reason that the City attempted to

impose conditions he found objectionable upon the development of his property. The courts below found such evidence unconvincing. 17 F.3d at 1239-1240; 796 F.Supp. at 1331.

As to other evidence of improper motives, landowners offered only speculation and opinions as to the City's alleged anti-development bias, and a single alleged remark by one city staff person to the effect that water and sewage constraints were being used as a "pretext" to limit development. Landowners did not submit any evidence at all to counter the City's documentation showing that existing city water supplies were in fact grossly insufficient to support the levels of development projected by the general plan. The courts below not only found landowners' evidence insufficient to raise any triable issue, but also noted that the City's goal of limiting development for reasons stated in the general plan is manifestly a legitimate exercise of the City's police power. 17 F.3d at 1236-1237; 796 F.Supp. 1325-1326.

B. Disputed Contentions And Facts Misstated In The Petition For Certiorari.

Pursuant to Rule 15.1, the City notes the following factual and legal matters stated in the petition for certiorari which are misstated, unsupported by the record or subject to substantial dispute. It should be noted that the City made timely evidentiary objections in the trial court to much of the "evidence" relied on by landowners. The district court did not rule on these objections, but instead found that landowners had failed to raise any triable issue even if such "evidence" was considered. Landowners had

thus already received more than the benefit of a doubt on their claims.

1. Viability of agriculture on landowners' land.

Landowners repeatedly assert that the economic infeasibility of continued agricultural use of the land, at least for growing strawberries, has been proven. Actually, the record contains no substantive evidence on this point. The courts below simply assumed that continued agricultural use was economically not feasible, based on the City's own willingness to immediately redesignate the land for residential use. Landowners have allegedly suffered losses in their attempt to continue strawberry growing in recent years. Whether this is the result of permanently changed conditions or of other factors, such as market fluctuations, the loss of Kingo Kawaoka's personal management expertise, bad weather or other conditions is open for debate.

2. Alleged inability to file a specific plan.

Landowners also claim that it was legally impossible to pursue a specific plan application for approximately one year after enactment of the City's amended general plan, because formal regulations for processing of specific plans were not adopted by the City until May, 1991. During this period the City's zoning code was comprehensively revised to implement the new general plan. Landowners contend that the land had no "economically viable use" during this period because potential development was foreclosed by the absence of formal specific plan procedures. The courts below appear to have accepted

landowners' contention on this point for the sake of argument, but found that such periods of delay, even if proven, did not render the City's actions unconstitutional or excuse landowners from actually applying for specific plan approval once the City's regulations were adopted. 17 F.3d at 1232-1233 and 1235; 796 F.Supp. at 1325.

Contrary to landowners' apparent contentions, the California statutes which authorize specific plans do not require local agencies to enact special implementing regulations before reviewing a proposed specific plan. The basic requirements for specific plans are contained in the state statutes themselves. See California Government Code sections 65450, *et seq.* Had landowners or some other party interested in developing the property seriously proposed a specific plan immediately following adoption of the revised general plan, such a proposal could have and would have been given full consideration. As it is, landowners' representatives admitted on the record that the family did not ever seriously intend to propose a specific plan but merely regarded the specific plan requirement as an impediment to sale of the property for the price they desired.

3. Alleged denial of "all economically viable use".

Landowners repeatedly assert they were denied of all "economically viable" or "economically beneficial" use of the property for at least some period of time. In fact, the record (as already noted above) shows that the family continued to farm the land, or lease it for farming, and also to live on the land throughout the litigation. In addition, the record contains appraisals prepared by landowners' own appraiser which show that the land

retained a market value of $2,400,000 even with the mild density restrictions and specific plan requirement. 17 F.3d at 1235-1236. Although landowners complained below that the property could not be sold at any price, the evidence showed that landowners actually ceased efforts to list or advertise the property after the general plan was enacted, and instructed the family's broker not to accept any offers less than $6,000,000. 796 F.Supp. at 1324. There is no factual basis for any claim of total, or even severe, loss of use or loss of value of the land.

4. Evidence of Racial Prejudice.

The petition refers to "evidence that the respondent decisionmakers were motivated by . . . race prejudice against persons of Japanese ancestry." Petition, p. 9. In fact, the courts below found that only one council-member had made an arguably racially motivated statement in private. The lower courts correctly concluded that this provided no basis for attributing racial motives to the City Council as a whole. In actual fact, landowners' witnesses were unanimous in testifying in depositions that none had ever heard, or even heard of, any arguably racial remark or other evidence of racism by any public official other than Doris Olsen.[1] Landowners' continued references to alleged racial motivation, even after they have abandoned their equal protection claim, can be

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[1] With respect to Ms. Olsen, a highly respected citizen, social activist and early female career journalist, the City remains convinced that Ms. Olsen never made the remarks attributed to her by landowners' real estate agent. There is substantial evidence in the record that Ms. Olsen *never* harbored the slightest animosity toward anyone based on racial considerations.

assessed only as a tasteless emotional gambit, not a legitimate legal argument. Landowners' further attempt to characterize the City's policies favoring agriculture as a "city-dwellers'" ploy to "depriv[e] Japanese American families of the economically beneficial use of their land," petition, p. 9, warrants no response.

5. The "Pretextual" Water Shortage.

Landowners contend that proposed residential development of their property would utilize less water than currently used to irrigate strawberries. From this they reason that the density restrictions and application of the temporary "water moratorium" to their parcel were arbitrary and a mere "pretext to block development." Petition, p. 7. The Court of Appeals found this issue at best a side-show because the property could not be developed without a specific plan, and no such plan was ever proposed. The one-year water moratorium had no actual impact on landowners. 17 F.3d at 1237.

The courts below also correctly noted that the City's evidence of a pending city-wide water shortage was in fact entirely unrebutted. 17 F.3d at 1237-1238. Landowners' irrigation water is pumped from the same common supply, an overdrafted groundwater basin, that other landowners in the City also depend upon. As the Court of Appeals noted, the City could, and indeed should, rationally take into account the water needs of the entire City, rather than merely the needs of landowners' parcel, in conducting its general planning. 17 F.3d 1238. The density restrictions on landowners' parcel were also enacted for additional reasons beyond water conservation, *i.e.*, concerns over traffic and a desire to preserve some

semblance of the City's historic character. 17 F.3d at 1236; 796 F.Supp. at 1326.

SUMMARY OF ARGUMENT

The "taking" argument was never raised below. This Court lacks subject matter jurisdiction over the claim because landowners never sought "just compensation" for the alleged taking through available state court procedures. *Williamson County*, 473 U.S. 172, 194-196; *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993); *Southern Pacific*, 922 F.2d 498, 502-503; *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574-1575 (11th Cir. 1989). The taking claim is also utterly without merit. The City's general plan permits substantial use of the property (approximately 83 residential units). The plan has not interfered with present use (agriculture) or unreasonably reduced the value of the property ($2,400,000 with the general plan designation).

The substantive due process claims are also entirely without merit. The courts below fully considered landowners' claims of improper or "pretextual" motives and excessive economic impacts. The lower courts simply found no factual basis for attributing false motives to the City, and found the alleged economic detriment well within the range normally associated with zoning and planning restrictions. Landowners simply failed to provide any substantial evidence to support a substantive due process claim under the standards applied by federal courts. The lower courts also correctly found that landowners' "as applied" substantive due process claims were not ripe because landowners had never made any effort to file applications for development of the property.

ARGUMENT

I.

THE COURT LACKS JURISDICTION OVER LANDOWNERS' "TAKING" CLAIM WHICH WAS NEVER RAISED BELOW AND IS ENTIRELY WITHOUT MERIT.

Grant of certiorari on landowners' first and main issue is patently inappropriate for two reasons;

(1) the "takings" issue was not raised below;

(2) the Court lacks subject matter jurisdiction over this claim because landowners never sought or were denied "just compensation" in state courts. *Williamson County*, 473 U.S. 172, 194-196.

Even were this Court inclined to consider the "merits," such as they are, this case involves no important issues of takings law; it is nothing more than a garden variety land use planning dispute. The City's general plan permits approximately 83 residential units on the 35 acre parcel. *Cf. Agins v. Tiburon*, 447 U.S. 255, 262 (1980), 100 S.Ct. 2138, 65 L.Ed.2d 106 [open space zoning limiting development to 1-5 units per 5 acres not a taking]. If landowners wish to sell, their own appraiser calculated the market value of the land, as restricted, at $2,400,000. This is hardly the kind of situation in which the "justice and fairness" commanded by the Fifth Amendment dictates that these landowners be rewarded at public expense. *Penn Central Transportation Co. v.*

New York City, 438 U.S. 104, 124 (1978), 98 S.Ct. 2646, 57 L.Ed.2d 631.

A. Landowners' "Taking" Claim Is Not Ripe For Review Because They Never Sought "Just Compensation" Through State Courts.

Landowners acknowledge that their counsel below decided "not to specifically allege a 'taking'," and that the courts below "held categorically 'that this is not a takings case.'" Petition for certiorari, pp. 13, 11.[2] Even this is a bit of an understatement. Landowners not only never even pled or argued any taking issue below, but they expressly acknowledged in their briefs that no taking claim was being pursued. Neither party attempted to make any record to support or disprove a taking claim. Nevertheless, having lost on all other grounds, landowners now assert that their previous omission "does not presently preclude this Court from determining whether a 'taking' occurred" and even suggest that the courts below had a duty to consider the takings issue sua sponte. Petition, p. 13.

Both the Ninth Circuit and landowners' former counsel understood that, since *Williamson County*, 473 U.S. 172, this Court has held that private landowners alleging a "taking" may not pursue their claim in federal courts until they have first exhausted available procedures

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[2] Somewhat inconsistently, landowners also state that their previous counsel's election not to raise a taking claim "did not stop the court below from considering the question, if in somewhat cursory fashion". (Petition, p. 13.) In fact, it is clear from the decisions published below that neither the district court nor the Ninth Circuit considered any hypothetical taking issue.

for recovering "just compensation" is state courts. 473 U.S. 172, 194-196. The rule has since been applied without question in every circuit. *Gamble*, 5 F.3d 285, 286; *Gilbert v. City of Cambridge*, 932 F.2d 51, 63-65 (1st Cir. 1991); *Southern Pacific*, 922 F.2d 498, 502-503; *Greenbriar*, 881 F.2d 1570, 1574-1575; *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 575-576 (7th Cir. 1990); *G.M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-681 (9th Cir. 1988).

Landowners made no attempt whatsoever to seek recovery through state courts. Since this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), 107 S.Ct. 2378, 96 L.Ed.2d 250, California courts have provided a constitutionally adequate damages remedy. *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991); *Sinaloa Lake Owners Assn. v. Simi Valley*, 882 F.2d 1398, 1403 (9th Cir. 1989); see *Healing v. California Coastal Commission*, 22 Cal.App.4th 1158, 1169, 27 Cal.Rptr.2d 758 (1994).

This Court has no jurisdiction to hear landowners' belated taking claim.

B. Landowners' Taking Claim Is Also Utterly Without Merit And Presents No Novel Or Important Issues Of Takings Law.

Aside from its jurisdictional problems, landowners' "taking" claim is frivolous on the merits.

Unlike *Dolan v. City of Tigard*, ___ U.S. ___, 94 Daily Journal D.A.R. 8803, and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), this case does not involve an unconstitutional exaction or physical taking of an easement or other interest in landowners' property. This is simply a case of the property being designated in the City's general plan in a manner which is alleged to reduce its development potential and impair its market value. The general plan does not interfere at all with the historic use of the land (agriculture); it does not prevent more profitable development. The general plan permits development of approximately 83 residential units on the property. (One residence - landowners' family home — exists there now.) Landowners' own appraiser calculated the value of the 35 acres, even with all challenged City restrictions in place, as $2,400,000. 17 F.3d at 1235. Although the record does not disclose it, this value is almost certainly greater than the value if sold for its current and historic use, *i.e.*, agriculture, even if it is less than the $6,000,000 landowners claim the land would be worth if it were upzoned to suit their personal demands.

No court in modern history has suggested that a mere reduction in potential profitability of land amounts to a taking; indeed, even demonstrable reductions in market value, absent the extreme, do not constitute a taking. *Penn Central*, 438 U.S. 104, 131; *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, __ U.S. __, 113 S.Ct. 2264, 2290 (1993). The City respectfully suggests that this case does not justify a new or different rule.

Landowners' alternate argument is that the City at least temporarily denied them "all economically productive and beneficial use of their land" for the one-year period in which (1) the City had not adopted specific procedures for approving a specific plan on the property; and (2) the temporary "water moratorium" was in effect. The courts below found that, even if these measures did place an additional one-year hurdle in the path of development, such delays are not unreasonable. 17 F.3d at 1237; 796 F.Supp. 1325. Landowners remained free to continue farming, and, contrary to claims in the petition, actually did so by first planting crops and then leasing the land for agriculture. The family also continued to occupy a portion of the land for their residence. The courts below also found no evidence that landowners were precluded from selling the land during this period for its appraised value of $2,400,000. Instead, landowners essentially imposed their own moratorium by refusing to list or advertise the property and instructing their broker to reject any offers below the unrealistic value of $6,000,000. 17 F.3d at 1231; 796 F.Supp. at 1324. They made it clear in the record below that they have no intention of developing the land; the family's desire is merely to sell the land to a qualified developer for top dollar.

The little authority cited by landowners does not support a temporary taking claim. *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993), cited at p. 12 of the petition, represents a fair statement of current law. As the court in *Tabb Lakes* noted, as long as a land use regulatory scheme permits reasonable development with appropriate permits, there is no taking. Delays in obtain-

ing necessary approvals are an inevitable and, absent extremes, permissible element of every regulatory scheme. 10 F.3d 796, 800-802, citing *Agins*, 447 U.S. 255, 263 n. 9 and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); see also *Gilbert*, 932 F.2d 51, 56; *Landmark Land Company*, 874 F.2d 717, 721. In *Tabb Lakes*, the facts presented were far more aggravated than here. Development of the plaintiff's parcel was substantially delayed by the assertion of the permitting authority which was ultimately found to be invalid. 10 F.3d at 802-803. The City in this case did not "take" plaintiff's land by enacting a temporary moratorium on new subdivisions while its water supply problems were studied, or by delaying slightly in adopting new regulations governing specific plans.

II.

THE COURTS BELOW CORRECTLY APPLIED THE LAW IN REJECTING LANDOWNERS' SUBSTANTIVE DUE PROCESS CLAIM

Landowners briefly contend that the courts below committed a number of legal or moral errors in rejecting their substantive due process claim. None of these claims have merit.

A. The Lower Courts Correctly Applied Federal Law In Rejecting The Substantive Due Process Claim.

Landowners do not cite any substantial disagreement between the Ninth Circuit and other circuits over

the standard to be applied to substantive due process claims. Instead they cite state court decisions from a total of two states (Washington and Missouri) which purport to apply a form of balancing test in determining whether local regulatory actions violate substantive due process. *Guimont v. Clarke*, 854 P.2d 1, 121 Wash. 586 (1993), *Barber & Sons v. Jackson County*, 869 S.W.2d 113, 117 (Mo. App.W.D. 1993); *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 839 (Mo. 1963). The City is aware of no decision by this Court or any federal circuit which endorses this approach. Although the circuits apply differing verbal formulas, they all uphold governmental actions against substantive due process challenges so long as the actions substantially advance a legitimate governmental interest, are not arbitrary or capricious, and are not taken for some impermissible motive, *e.g.*, discriminatory or retaliatory motives. See, generally, *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217-1224 (6th Cir. 1992) [discussing substantive due process cases from all circuits]; see also *Pennell v. City of San Jose*, 485 U.S. 1, 11, 108 S.Ct. 849, 857, 99 L.Ed.2d 1 (1988); *Nestor Colon Medina & Sucesores, Inc. v. Custudio*, 964 F.2d 32, 45-47 (1st Cir 1992).

It is perhaps worth noting that not even the erroneous state decisions cited by landowners would support recovery on the facts of this case. In *Barber & Sons*, 869 S.W.2d 113, 117-118, the court found that reduced land value caused by the county's zoning decision was a "detriment to which this court does not afford significant weight." The land at issue was deemed worth $5,000 per acre as zoned by the county versus $48,300 per acre if rezoned as desired by the plaintiff, a ninefold

differential. In this case the land is worth $2,400,000 as zoned versus a theoretical value of $6,000,000 if rezoned as desired by landowners. Thus, even under the indulgent standards applied in Missouri, landowners plainly would have a difficult time persuading any court that the City's actions imposed an excessive private detriment.

B. The Court Below Did Not Fail To Consider Relevant Factors In Denying Landowners' Facial Substantive Due Process Claim.

Landowners' basic contention on their facial substantive due process claim is that the courts below ignored a number of allegedly relevant factors. All of landowners' points were thoroughly considered by the courts below, even those arguably irrelevant under the controlling standards. The courts below simply concluded that the claims were not only legally specious but wholly unsupported by evidence. It is, of course, a proper function of summary judgment motions to screen out such claims.

Landowners first fault the lower courts for failing to consider the "detriment" to themselves in terms of alleged loss of use of their land and reduced market value. As discussed previously, there was no loss of use. They remained free to farm or lease the land, and actually did so. They were also free to pursue development permits or sell the land for development, subject only to the City's planning requirements. With these restrictions the land retained a value of $2,400,000, or approximately $68,500 per acre, even according to petitioner's own appraiser. If this is an unconstitutional economic hardship, it is one most citizens would be willing to bear even

without compensation. Contrary to landowners' contentions, the lower courts fully considered their economic claims in determining whether their due process rights were violated. 17 F.3d at 1235; 796 F.Supp. at 1329-1330. The Court of Appeals expressly noted the difference between the property's as-is appraised value ($2,400,000) and the $6,000,000 desired by landowners. 17 F.3d at 1235-1236. The court simply concluded that this is not the type of extreme imposition which might justify a substantive due process claim.

The courts below also considered landowners' arguments regarding development delays and "lost use" of the property caused by the specific plan requirement. 17 F.3d at 1233. Applying well-settled principles, however, the courts simply found the relatively short-term delays involved were neither unreasonable nor unconstitutional given the modern realities of planning and development and so has every other court which has considered the issue, including this Court. See, *e.g.*, *Agins*, 447 U.S. 255, 263 n. 9; *Tabb Lakes*, 10 F.3d 796, 800-802 [three-year delay caused by improper assertion of regulatory authority]; *Armour and Company, Inc. v. Inver Grove Heights,*, 2 F.3d 276, 278 (1993) [alleged reduction of value and loss of ability to sell property caused by protracted redevelopment planning activities]. Landowners' situation is no different than that of virtually any large parcel owner today who would prefer to build condominiums rather than grow crops. The government does not act arbitrarily or capriciously or incur liability under the due process clause because it places reasonable limits on development, and requires planning and devel-

opment to proceed in a rational manner. The Court of Appeals in this case held no more.

C. The Lower Courts Properly Found That Landowners Failed To Produce Any Genuine Evidence Of Improper Motives.

Landowners, although having abandoned their equal protection claim, contend that the court below erred by failing to consider the possible "pretextuality of respondent decisionmakers' state of mind." Petition, p. 15. The courts below fully considered landowners' claim of pretextual motives, and found it entirely devoid of evidentiary support. Landowners attempt to recharacterize the record as containing actual evidence of improper City motives. It does not. The lower courts found the City's stated reasons for the general plan amendments and water moratorium were fully supported by facts and reason set forth in the record in lengthy declarations and the administrative record of the City's actions. There is *no* countervailing substantive evidence suggesting that a majority of the City Council members acted for any improper reason. Having failed to produce anything other than suspicion and speculation regarding alleged ulterior motives, landowners could not survive summary judgment.

D. The Courts Below Correctly Held That Landowners' "As Applied" Claim Was Not Ripe.

It is less than clear what difference it would have made even had the lower courts addressed landowners' "as applied" substantive due process claim on its merits. In any case, landowners do not appear to dispute that any

"as applied" substantive due process claim must meet the final decision requirements of *Williamson County*, 473 U.S. 172, 199-200; see also *Southern Pacific*, 922 F.2d 498, 507; *Landmark Land Company*, 874 F.2d 717, 722; *Kinzli*, 818 F.2d 1449, 1456.

In an effort to get around this particular hurdle, landowners simply recharacterize the issue and completely misstate the record. The courts below, having found the City's specific plan requirement and water moratorium *facially* valid, held that landowners must actually apply for specific plan approval before making an *as applied* attack on these regulations. 17 F.3d at 1231-1233. Landowners claimed below, and again in this Court, that it would have been futile to apply for specific plan approval because specific regulations for processing specific plan applications were not adopted until May 1991, approximately one year after the general plan was adopted. This argument misses the point.

First, landowners do not deny that an application could have been filed well before judgment was entered in this action, rendering further litigation potentially unnecessary. 17 F.3d at 1232. Second, landowners misunderstand the "futility" exception to the ripeness doctrine. The fact that an owner is required to *wait* before filing an application, at least where the period of delay is not unreasonable, does not mean that application will be futile. This Court and other courts have long recognized that some degree of delay or inconvenience adheres in every planning process and is simply one of the incidental burdens which must be born for the privilege of living in a modern society. *Agins*, 447 U.S. 255, 263 n. 9; *Gilbert*, 932 F.2d 51, 56; *Landmark Land Company*, 874 F.2d

717, 721. Landowners' claim is particularly hollow in this case; they admitted below that the family has no intention of submitting and following through on a specific plan application themselves; their real objection is merely that the specific plan requirement allegedly adversely affects the property's value.

Landowners' argument is buttressed with several gross distortions of fact. For example, they allege that "There is no question that for years prior to respondents' adoption of procedures by which landowners could supposedly apply for 'specific plans' enactment by the City Council, the Kawaokas had notified respondents of the current non-viability of agricultural uses on their property." Petition, p. 16. The "specific plan" requirement complained of did not even exist until May 1990 when the general plan was adopted. It was never previously asserted and there is *no* evidence that landowners ever advised the City that agriculture was (allegedly) no longer viable on their land before the general plan hearings. In fact, landowners or their lessees were still growing strawberries on the land when the case was heard in the Court of Appeals.

Landowners now baldly assert that a "meaningful application" was made for specific plan approval in the form of "in person contact between the Kawaokas and their representatives on the one hand, and various city representatives on the other." Petition, p. 17. This passage apparently refers to one of the few occasions in which landowners' "consultant", Bertram Johnson, made informal inquiries by telephone or at the City Planning Department counter as to how application could be made for a specific plan. That the courts below did not find

these superficial inquiries to be a "meaningful application" should come as little surprise. See *Reserve Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1381-1382 (11th Cir. 1994) [informal efforts to have permit restored insufficient to satisfy final decision ripeness requirements].

CONCLUSION

This case raises no significant issue for Supreme Court review. The petition for certiorari should be denied.

Respectfully submitted,

KATHERINE E. STONE

MYERS, WIDDERS & GIBSON

Counsel of Record for Respondents,
CITY OF ARROYO GRANDE, et al.

APPENDIX

APPENDIX

DECLARATION OF LLOYD B. ZOLA

1. I am a citizen of the United States and the State of California. I am over the age of 18 years and if called upon, could and would competently testify to the following.

QUALIFICATIONS

2. I am the founder and president of a professional planning consulting firm called Planning Network and have been so for over eight (8) years. I have been hired by the City of Arroyo Grande ("City") as an expert witness in the case of *Kingo Kawaoka v. City of Arroyo Grande*. I received my B.A. in Urban Studies in 1974 and did graduate studies in Public Administration. As president and founder of Planning Network, I employ and supervise over twenty (20) employees. I directly prepare planning studies and reports, including general plans, specific plans and environmental impact reports ("EIR"s). I am responsible for overall project strategy and quality control, design and implementation of public participation programs and making presentations before administrative and legislative bodies.

3. Prior to founding my own consulting firm, I was Director of Planning for L.D. King Engineering for three (3) years. I was responsible for preparing specific plans and EIRs. I spent the previous five (5) years as a planner for public agencies including Riverside County, San Joaquin County and the City of Concord. I prepared several General Plan elements, and reviewed and proposed comments on legislation on preserving agricultural land.

4. I have received project awards for preparing The Moreno Valley General Plan, The Foothill Boulevard Specific Plan and The East Chino Specific Plan.

5. I was also an expert witness on behalf of the Quechan Tribe of the Fort Yuma Indian Reservation in a case relating to adjudicating water rights along the Colorado River. The case included a determination of which portions reservation could be commercially farmed. A true and correct copy of my curriculum vitae is attached as Exhibit A.

THE CITY OF ARROYO GRANDE

6. The City of Arroyo Grande ("City") is located on the central coast southwest of the City of San Luis Obispo. Its population in 1988 was approximately 13,700. The entire City is 5.45 square miles. (Exhibit 3, *Existing Setting Report,* p. 102.) Arroyo Grande was historically a farming town. In 1988 there existed approximately 700 acres of land designated agriculture within the city limits. (Exhibit 5, EIR, p. 164.) Agricultural production includes row crops such as strawberries and vegetable farming. In 1988, approximately 72 acres within the City were farmed for strawberries. There are still approximately 72 acres cultivated with strawberries.

THE GENERAL PLAN UPDATE

Overview of General Planning

7. Under California law, every city is required to have a General Plan which serves as a "Constitution" for land use within the city. (Government Code § 65300.) The General Plan guides the long term physical development of the City and is comprised of goals, policies and objectives, and includes a land use diagram designating population density and building intensity. (Government Code § 65302.) There are seven (7) mandatory elements

of a General Plan (land use, housing, conservation, open space, circulation, noise and safety) and several optional elements. (Government Code § 65302.) Cities are required to update a General Plan as necessary to ensure the plan adequately addresses future land use issues. The housing element must be updated every five (5) years — Government Code § 65588.

Overview Of Arroyo Grande's General Plan Update Process

8. I was retained by the City in early 1988 to update three (3) elements of its General Plan; land use, conservation and open space. At the same time, City staff was directed to update the housing element. (Collectively these actions were known as "General Plan update".) The City's General Plan update process took place over a two (2) year period, and included the following steps:

a. Evaluating existing land uses, resource constraints and public concerns resulting in a report entitled "*Existing Setting and Community Issues Report.*"

b. Drafting three (3) land use alternative scenarios resulting in a report entitled "*Land Use Alternatives and Holding Capacity Report.*"

c. Drafting the land use, housing, open space and conservation elements of the General Plan.

d. Preparing an Environmental Impact Report ("EIR") on the General Plan update. (Public Resources Code § 21000 *et seq.*)

e. Revising the draft General Plan update per Planning Commission and City Council direction and public input.

Public Participation In The Arroyo Grande General Plan Update

9. Public participation in the General Plan update was extensive. The City notified over 5,100 people of the General Plan update, conducted an informal community opinion survey and held thirteen (13) workshops and public hearings before the Planning Commission and City Council over a two (2) year period. Early in the General Plan program, community leaders were interviewed by myself and my assistant, Mr. Kent Norton of Planning Network. Interviews consisted of one-on-one sessions with City Council members including Councilwoman Doris Olsen, one Planning Commission member, and members of the public selected by the City. I personally interviewed the Mayor and all councilmembers, including Doris Olsen. In none of the interviews were any disparaging statements against any racial group made. All of those interviewed emphasized agriculture as a major component of the City's identity, and indicated that, although it might be difficult, agricultural lands should be preserved.

10. In addition to community leader interviews, I conducted two (2), one-evening town hall meetings. During these meetings, local residents emphasized their desire to retain the City's rural, small town character and also requested that agricultural lands within and adjacent to the City be preserved. As a follow-up to community leader interviews and town hall meetings, a "Land Use Alternatives and Holding Capacity Report" ("Alternatives Report") was prepared by Planning Network under my direction. (Exhibit 4.) The report was completed on May 17, 1989. The purpose of the report was to identify the major policy choices which the City's updated General Plan would address.

11. I conducted two (2) joint workshops for the City Council and members of the City boards and commissions on June 19, 1989 and November 20, 1989. Retaining the City's rural small town character and preserving agricultural lands were identified in these workshops as important objectives for the General Plan. The workshops also resulted in a consensus to manage future population growth in a manner consistent with available resources, particularly water.

12. In other communities, I have found "agricultural preservation" to sometimes be related to a desire to slow or stop urban development rather than a desire to really preserve agriculture. In Arroyo Grande, I found this generalization to be untrue; I found that local citizens wanted to see agriculture operations continue.

13. Ten (10) public hearings were held: Five (5) before the Planning Commission on 1/2/90, 1/30/90, 2/6/90, 2/26/90, and 3/19/90; and five (5) before the City Council on 4/9/90, 4/24/90, 4/25/90, 4/30/90, and 5/22/90. I was present at the public hearings, I presented General Plan materials, answered questions and considered all testimony. Exhibits 7 and 8 are certified copies of the minutes of these meetings.

AGRICULTURAL LANDS AND THE GENERAL PLAN UPDATE

Overview

14. Agriculture has been the central historical and economic activity in Arroyo Grande since the 1840's. The nature of this resource is important when analyzing how growth and change will affect the City. (*See* Exhibit 3, *Existing Setting Report*, p. 102.) The City's previous General Plan did not contain sufficient policy direction to adequately preserve agricultural lands. (Exhibit 5, EIR, p. 169, ¶ 4.) By 1988 the City had already lost over half

of its original approximate 725 acres of prime agricultural soils to nonagricultural uses (Exhibit 3, *Existing Setting Report*, pp. 103, 104 and 106; Exhibit 5, EIR, p. 165, ¶ 1(2)). Preservation of agriculture emerged during the general plan update as one of the strongest community objectives. (Exhibit 3, *Existing Setting Report*, p. 108.)

15. The Alternatives Report identified three (3) alternatives for preserving existing agricultural land.

a. Preserve all existing agricultural land, whether or not they contain prime agricultural soils (as defined by the U.S. Soil Conservation Service).

b. Preserve agricultural lands with prime soils for agricultural use (399 acres), and allow non-prime lands to convert to low density housing.

c. Preserve certain prime agricultural lands (330 acres) by establishing selected roadways as permanent barriers to further development (Exhibit 4, Alternatives Report, pp. 123, 126, 129.)

16. The consensus among Planning Commission and City Council as expressed at their June 19, 1989 joint workshop was that agricultural lands within and adjacent to the City should be preserved to the maximum extent possible.

The Subject Property: Fifty-five (55) Acres of Strawberry Fields

17. It is my understanding that the property at issue in this lawsuit is fifty-five (55) acres of strawberry fields located on the southern border of the City ("subject property"). It is also my understanding that thirty-five (35) of these acres are held in trust for the plaintiffs, the Kawaokas ("plaintiff's property"). Plaintiffs' property is cultivated for strawberries and contains residences for the Kawaokas. The remaining three (3) properties are

cultivated for strawberries and contain commercial fruit stands. It is also my understanding that these three (3) remaining properties are owned by the Matsomotos, Tomas and Youngs. (*See* Exhibit 18, deposition excerpts of Craig Kawaoka, p. 458, line 15.)

18. At the joint public workshops, the Planning Commission and City Council leaned towards preserving the agricultural use of the subject property. They also expressed concern regarding the future viability of agriculture on the subject property. In response to these concerns, I proposed that the City add a policy (later to become Land Use Element ("LUE") Policy 1.5) which would permit the future conversion of the subject property to residential and commercial uses upon a showing that agriculture was no longer economically viable.

19. My understanding of the consensus reached by Planning Commission and City Council members at their June 19, 1989 workshop is:

a. All agricultural lands within and adjacent to the City, including the fifty-five (55) acres of subject property should be designated as Agriculture on the General Plan land use diagram.

b. It would be desirable to retain the existing agricultural uses on subject property *as long as they were viable.*

c. A determination of viability would be made at such time as a proposal to develop the subject property was brought forward to the City. This understanding is reflected in the minutes of the June 19, 1989 workshop, Exhibit 6.

20. After the June 19, 1989 workshop, Planning Network, under my direction, prepared the Land Use Element ("LUE") and Open Space and Conservation

Element. The first draft of the General Plan designated the subject property as "Agriculture" on the land use diagram and included LUE Policy 1.5 which provide that,

> "At such time as they are no longer economically viable, permit the conversion of the existing strawberry fields located south of Grand Avenue near the western city limits to urban use subject to preparation of a specific plan as set forth in Government Code Sections 65450-65457."

21. Other agricultural lands within the city were preserved and protected by requiring that all prime soils be retained as agriculture. (Exhibit 2, General Plan-LUE Policies 12, LUE, p. 14; *see* also policy 1.2, p. 14.)

Plaintiffs' Property

22. During the public hearings before the Planning Commission, plaintiffs or their representatives indicated they did not want their thirty-five (35) acres designated agriculture on the land use diagram. The Planning Commission recommended to the City Council that the agricultural designation be adopted for the plaintiffs' property, noting that proposed LUE Policy 1.5 would permit conversion to residential uses upon a showing of economic infeasibility and preparation of a specific plan.

23. At public hearings before the City Council, plaintiffs or their representatives claimed strawberry farming was not viable at the present time and requested a residential designation for the property on the land use diagram. In response to plaintiffs' request, the City Council revised the General Plan diagram to designate residential use (with a small amount of commercial use along Grand Avenue) for the fifty-five (55) acres of strawberry fields which include the Kawaoka property.

The City retained the requirement that a specific plan be prepared before residential development could occur. City Council's actions are reflected in the minutes of April 25, 1990. (Exhibit 8.)

SPECIFIC PLAN AS A PLANNING TOOL

24. A specific plan is a recognized and appropriate planning method to facilitate conversion of existing agricultural uses to other uses. Specific plans are a traditional planning tool, authorized by the State legislature over twenty-five (25) years ago (Government Code § 65450, *et seq.*). Specific plans are typically used to master plan areas with multiple parcels in separate ownership that pose common planning issues. (*See* State General Plan Guidelines, Exhibit 13, p. 373.) Specific plans specify the distribution, location and extent of land uses and essential infrastructure such as water, sewage, roads, waste disposal. (*See* Government Code § 65451.) They avoid redundant planning expenses, avoid duplication of infrastructure costs and allow for shortened environmental review. A specific plan may be prepared by either the private or public sector. (Government Code § 65450; Exhibit 13, General Plan Guidelines, p. 373.) In my experience the vast majority of specific plans are prepared by the property owners and submitted to the city for review and adoption. A description of specific plans is set forth in the General Plan Guidelines, published by the State Office of Planning and Research.

25. As early in the General Plan update process as May, 1989, in the Alternatives Report, I, along with City staff, recommended that a specific plan be prepared when the subject property converted from agriculture. In my opinion a specific plan requirement was an important planning requirement for the subject property for the following reasons:

a. All of these properties are planted in strawberries and share similar difficulties in continuing agriculture use. Developing any one of the parcels in isolation could increase the problems facing the remaining owners.

b. The fifty-five (55) acre subject property is one of the largest undeveloped sites remaining in the City. There is a need to plan roads, coordinate sewage disposal, roadways, easements, drainage, utility services and to distribute available water supplies and sewage capacity.

c. A specific plan would also address the unique problem facing the entire site, that of potential pesticide residues in the soil, resulting from a long history of pesticide and fumigant use.

d. The specific plan would provide the owners of the strawberry fields with sufficient flexibility to determine the optimal land use mix and site design at the time they were ready to convert the property from agricultural use.

26. Based upon my experience and my two (2) years of work on the Arroyo Grande General Plan update, I am of the opinion that the specific plan requirement for conversion of the strawberry fields to non-agricultural uses is appropriate; this requirement is a responsible planning strategy to facilitate conversion of the strawberry fields to a mix of residential and limited commercial uses.

RESIDENTIAL DENSITY FOR PLAINTIFFS' PROPERTY

27. Plaintiffs' property was designated heavy commercial/light industrial under the 1987 General Plan, but being cultivated for strawberries at the time of the General Plan update.

28. In keeping with plaintiffs' request for a residential designation, the City Council adopted a mixed residential designation for the plaintiffs' property. The General Plan update permits residential development on the subject property at a density of 4.5 dwelling units per acre on half of the property and one dwelling unit per acre on the other half of the property. Exhibit 1 is a copy of the General Plan land use diagram showing these designations.

29. I recommended this density because of the limitations which the City faced regarding long-term water availability. Sufficient long-term water supply was not available to the City to support buildout of the General Plan at a higher density. I believe that this density is compatible with surrounding land use densities.

30. In addition, I recommended the density which was ultimately applied to the Kawaoka property as a compromise between the density of surrounding residential lands, and the policy direction given by Planning Commission and City Council members at their June 19, 1990 workshop as to the appropriate density for existing non-prime agricultural lands (one dwelling unit per one and one-half acres). Thus, although the density assigned to the Kawaoka property was less than that of surrounding developed lands, it was greater than the density assigned by the updated General Plan land use map to other existing, non-prime agricultural lands.

31. My recommendation for a mix of residential densities was based on "averaging out" the intensity of use within the fifty-five (55) acre strawberry fields, considering the General Commercial designation assigned to the lands adjacent to Grand Avenue. In this manner, the overall intensity, projected water consumption, and

projected traffic generation of the fifty-five (55) acres would be equivalent to that of surrounding lands.

32. In recommending the density ultimately assigned to the fifty-five (55) acres of strawberry fields, I believed that the proposed density would be compatible with surrounding land use densities.

33. The mixed residential density supports several additional General Plan policies and objectives including:

Objective 2.0. Encourage residential densities, intensities, and patterns that are consistent with a rural lifestyle and image and which provide an appropriate range of housing consistent with the Arroyo Grande Housing Element. (Exhibit 2, General Plan-LUE p. 16.)

Policy 2.3. Broaden the range of, and encourage innovation in, available housing types, provide housing for those not desiring dwellings on individual parcels, those desiring a mobilehome lifestyle, as well as for those desiring amenities not generally found in small town subdivisions, such as common open space and recreational areas. (Exhibit 2, General Plan-LUE p. 17.)

Policy 8.1. Limit the intensity of land use and area population to that which can be supported by the area's resource base, as well as circulation and infrastructure systems. (Exhibit 2, General Plan-LUE, p. 38.)

WATER CONSTRAINTS

34. As part of my duties in preparing the General Plan update and EIR, I reviewed reports and studies on the City's water supply. I concluded that the City did not have enough water available to accommodate maximum buildout under the then existing General Plan.

35. The City's total annual water supply was estimated under the General Plan update as follows:

1,202 acre feet of groundwater from the local groundwater basin (based upon an informal agreement with surrounding communities and districts)

2,290 acre feet from Lopez Lake (based upon a formal adjudication)

3,492 Total Acre Feet

(*See* Exhibit 3, Existing Setting Report, p. 111; *See* Exhibit 5, EIR, p. 166-167.)

36. Based upon an average daily per capita water consumption of 190 gallons, the EIR concluded the City's water supplies could only support a population of 16,800. The EIR concluded the City would already have a population of approximately 16,500 by April 1989 if all homes were occupied (including approved units). (Exhibit 5, EIR, pp. 166-167.) The previous General Plan had planned for a maximum population of 24,000. (Exhibit 5, EIR, p. 166.)

37. It was clear that the General Plan update would need to reflect a reduction in population growth. I recommended overall density reductions throughout the City as a means of addressing the water shortage.

38. The resulting General Plan update contains a level of growth that is nineteen percent (19%) less than the previous General Plan. (Exhibit 5, EIR, p. 167.) Even so, projected buildout of approximately 19,500 population is estimated to exceed the available water supply by approximately 656 acre feet a year. (Exhibit

5, EIR pp. 166-167.) The City adopted mitigation measures and policies to minimize the projected water shortage as part of the General Plan update. (Exhibit 5, EIR, p. 168.) The City Council also adopted Interim Urgency Ordinance No. 421 C.S., temporarily suspending certain development applications including lot splits and/or second units. (Exhibit 12, Ordinance 421 C.S.; Exhibit 6, minutes of City Council hearing of May 22, 1990.) Ordinance No. 421 C.S. states the potential existed that the City water supply would be exhausted and overtaxed and there existed a current, immediate and continuing threat to the public health, safety or welfare if land divisions, rezoning and second units continued to be approved. Ordinance No. 421 C.S. was extended by Ordinance No. 423 C.S. (Exhibit 12), which expired in May, 1991.

39. Based on my experience and expertise and specifically my two (2) years work on the General Plan for the City of Arroyo Grande, it is my opinion that the General Plan land use, open space and conservation elements prepared under my direction fully comply with state law and are consistent with and reflect community desires that were expressed during the General Plan update including the need to preserve agricultural lands to the maximum extent feasible and to manage future growth in keeping with resource constraints.

I declare under penalty of perjury that the foregoing is true and correct and is of my own personal knowledge, that if called to testify I could and would competently testify to the same, and that this declaration, was

executed this _____ day of November 1991, at _____, California.

Original signed

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on August 16, 1994, I served the within *Opposition To Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
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San Francisco, CA 94119-3939

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Westlake Village, CA 91361
(805) 495-5533
Attorneys for Petitioner, Tatsumi Kawaoka

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 1994, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)

(3)

Supreme Court, U.S.
FILED
AUG 25 1994
OFFICE OF THE CLERK

No. 94-99

In The

Supreme Court of the United States

October Term, 1994

KINGO KAWAOKA and TATSUMI KAWAOKA,

Petitioners,

vs.

THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A.K. DOUGALL; and DORIS OLSEN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner Tatsumi Kawaoka respectfully submits the following brief in reply to arguments first raised in the opposition that (1) this Court lacks subject matter jurisdiction over her "takings" claim under the Fifth and Fourteenth Amendments, and (2) that the lower courts engaged in "factual misstatements and distortions" of the facts in the record.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS THAT HER LAND WAS SUBJECTED TO A "TAKING" REQUIRING "JUST COMPENSATION".

1. Whether petitioner has waived her "takings" claim.

The Ninth Circuit recognizes no difference between substantive due process and "takings" challenges to land use regulation. The election of plaintiff's prior counsel not separately to allege a "taking" in the complaint is not only excusable, but an accurate reflection of the then-existing and current state of Ninth Circuit authority.

As recently as June 6, 1994, it was observed that "the Ninth Circuit has suggested that the due process standard of reasonable relation to legitimate purpose applies to the regulatory takings field as well," *The Adamson Companies v. City of Malibu*, ___ F.Supp. ___, 94 Daily Journal D.A.R. 9158 (C.D. CA June 6, 1994), citing *Commercial Builders v. Sacramento*, 941 F.2d 874 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1997 (1992). In *Commercial Builders* the Ninth Circuit held that this Court's

"substantially advance" test for regulatory takings articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) was identical to the "rational relationship" test in substantive due process analysis, with the burden placed on the landowner to prove "that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (Petition, app. 41) without regard to whether "the City's legislative acts actually advance its stated purposes" (Petition, app. 15) (It is noteworthy that Judge Beezer's dissenting opinion in *Commercial Builders*, a case involving exactions upon commercial landowners for low income housing, advocated a test nearly identical to that articulated by this Court in *Dolan v. City of Tigard*, ___ U.S. ___ (1994) in which the city would have the burden of establishing the proportionality between the exaction and a causal nexus between the landowners' particular use of property, and the social problem sought to be ameliorated, i.e., the lack of low income housing).

The absence of a specific "takings" allegation in the complaint is consistent with the difficulty experienced by all courts in defining any line of demarcation between exercises of the police power (substantive due process) and eminent domain (takings). More than a century ago, Massachusetts Supreme Court Justice Oliver Wendell Holmes found the difference between exercises of the police power and eminent domain to be a matter of *degree, Rideout v. Knox*, 148 Mass. 368 (Mass. 1889), a view he would later express as a Justice of this Court in the oft-quoted passage in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) that "while property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a taking", *Id* at 415. "The difficulty of determining, in cases involving nothing like a physical invasion or trespass, just how far is 'too far' has predictably plagued the Court for over six decades," Tribe, *American Constitutional Law 2d ed.* (1988), 595. See also, *Loveladies Harbor Inc. v. United States*, ___ F.3d ___, no. 91-5050 (Fed. Cir. June 15, 1994).

Petitioner Mrs. Kawaoka cannot be said to have waived her "takings" claim by failing to describe an analytical distinction between "takings" and "substantive due process" challenges which courts and scholars have heretofore been unable to define. She did not waive her "takings" claim by making her complaint conform to Ninth Circuit authority that there is no difference at all between "regulatory taking" and "substantive due process" analysis of land use regulation.

2. Whether petitioner was required to bring her "takings" claim in the state courts in the first instance.

Respondent badly misreads *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985), which did not hold, as respondent hoped, that landowners must litigate their "takings" claims in the state courts prior to invoking the jurisdiction of the federal courts. *Williamson* held that when an administrative procedure exists by which "just compensation" can be obtained by the landowner, irrespective of whether the proposed government action can be labeled a "taking", there must be a final administrative decision prior to any

court challenge. In *Williamson*, Tennessee law, in cases where government exercised its power of eminent domain, landowners had specific administrative and state court remedies to obtain compensation independent of challenges based upon the Constitution.

Nothing like the Tennessee statute applies to the present case. Respondent has not pointed to any administrative procedure available under state law, or any independent state law causes of action, in which the landowner may obtain just compensation for city actions not conceded to be an exercise of eminent domain. More importantly, there are no state administrative proceedings which apply anything resembling this Court's test of proportionality articulated in *Dolan*.

"Clearly, the Supreme Court contemplates that a facial takings challenge can be adjudicated prior to the exhaustion of all state remedies provided that a concrete controversy exists between the parties", *The Adamson Companies, supra*. The present "takings" challenge is a "facial" challenge because (1) the land could not be developed because the water moratorium was imposed, and (2) the city's requirement of a specific plan for approval of residential uses of the property while, at the same time, refusing to consider any specific plans, was the functional and logical equivalent of *enforcement* of an ordinance prohibiting all development without exception. A justiciable controversy is therefore presented to this Court.

II. THE LOWER COURTS HAVE NOT MISREPRESENTED THE FACTS IN THE RECORD.

In an odd but understandable example of "role reversal", it is the respondent city which attacks the lower courts' description of the facts as "[illegible]ortions" and "misstated, unsupported by the record or subject to substantial dispute" (Opposition, pg. 8), understandable because the facts cannot support the city's legal position.

Thus, respondents attack the lower courts' findings that agriculture was no longer an economically viable use of the Kawaoka property as not based on "substantive [*sic*] evidence on this point" and the courts therefore "*simply assumed* that continued agricultural use was not feasible" (Opposition, pg. 9). Respondent forgets that its published ordinance, Land Use Element 1.5, permitted conversion of the Kawaokas' (and Tomas' and Matsumotos') property to commercial or residential use only upon a finding that existing agricultural use was "no longer economically viable"; that its official but unwritten designation of the Kawaokas' property as residential was based upon evidence from the Kawaokas regarding the impossibility of realizing any reasonable return on investment through farming, Petition App. 66-67 (While the action has been pending, the petitioner has learned, not really to her surprise, that professional real estate appraisers and potential buyers are not willing to rely on the unpublished residential designation of the property. It is not reasonable to expect that any potential buyer would assume the risk of the city's inaction on approving a specific plan or enacting and publishing a residential

designation of the Kawaokas' property. All anecdotal evidence of land value necessarily assumed respondent's approval through City Council action of both a formal published regulation designating the Kawaokas' property as appropriate for residential use, and the approval of a specific plan; otherwise, the property's value is nil, with Mrs. Kawaoka facing insolvency).

Respondent city knows it is most vulnerable for its unexplained failure to entertain or consider any applications for "specific plans" after May 22, 1990, the date on which it simultaneously made approval of such "specific plans" a necessary prerequisite to converting the land use designation of the Kawaokas' property from agricultural to residential. The city is aware that this unexplained *default* in its decisionmaking process cannot reasonably be described as a delay in the decisionmaking process itself, losses from which a landowner would not ordinarily be entitled to compensation *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1988). Respondent's personal attacks against petitioner and her representatives are a poor substitute for evidence to controvert the lower court's findings that the Kawaokas "were informed that they could not apply for specific plan until the ordinances containing the guidelines and applicable procedures were in place" (Petition, app. 7).

Finally, respondent attacks the lower courts for failing to find that "landowners essentially imposed their own moratorium by refusing to list or advertise the property and instructing their broker to reject any offers below the unrealistic value of $6,000,000" (Opposition, pg. 18). With respect, it was not the now-78 year old Mrs. Kawaoka who created the water moratorium, or who

decided that respondent would require approval of a specific plan for a residential designation while refusing to consider specific plan applications. An ordinance requiring a specific plan while the city refuses to consider specific plans gives the municipality total and absolute discretion over development, including the discretion to prevent any development at all. This dangerous gimmick, by which the municipality regulates land use without promulgating any written land use regulation subject to judicial review, is not yet "garden variety" land use planning anywhere in the United States, but will surely become so if the lower court is affirmed in this case.

CONCLUSION

The respondent concedes that the lower courts' analysis of this city's actions is inconsistent with *Dolan v. City of Tigard, supra,* arguing instead that *Dolan* should not apply to regulatory takings. The respondent concedes the conflict between the Ninth Circuit and state courts regarding substantive due process analysis. Current Ninth Circuit authority, which finds no analytical difference between substantive due process and takings challenges to land use regulation, is inconsistent with the authority of this Court and therefore inadequate to providing a rule of decision in the present case which will result in a resolution which is fair to both parties. Both Mrs. Kawaoka and the City of Arroyo Grande deserve an opportunity to participate with this Court in once again attempting to find a rule reconciling the legitimate interests of both the private landowner and the municipality.

The petition should be granted.

Date: August 24, 1994

Respectfully submitted,

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